

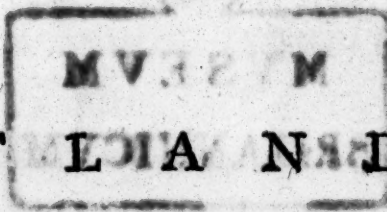
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ELUCIDATIONS

RESPECTING

The COMMON and STATUTE LAW

O F



S C O T L A N D.

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ELUCIDATIONS

RESPECTING

The Common and Statute Law



EDINBURGH

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T O
The RIGHT HONOURABLE,
HENRY DUNDAS,
of MELVILLE,
ADVOCATE-GENERAL for Scotland.

THough Law has been my chief employment in a long and laborious life, I can however address my young friend, without even a blush, requesting his patronage to this little work. As in some instances it pretends to dissent from established practice, I know few men, young or old, who have your candour to make truth welcome against their own prepossessions ; still fewer who have your talents to make it triumph over the prepossessions of others.

HENRY HOME.

TO THE HONORABLE
MEMBERS OF THE HOUSE OF REPRESENTATIVES
IN SENATE

OF THE STATE OF NEW YORK
IN SENATE

REPORT
OF THE COMMISSIONERS OF THE LAND OFFICE
IN SENATE

FOR THE YEAR 1884
IN SENATE

ALBANY: PUBLISHED BY THE
UNIVERSITY OF THE STATE OF NEW YORK
IN SENATE

1885
IN SENATE

FOR THE YEAR 1885
IN SENATE

ALBANY: PUBLISHED BY THE
UNIVERSITY OF THE STATE OF NEW YORK
IN SENATE

P R E F A C E.

NO science affords more opportunity for exerting the reasoning faculty, than that of law; and yet, in no other science is authority so prevalent. What are our law-books but a mass of naked propositions, drawn chiefly from the decisions of our supreme courts, rarely connected either with premises or consequences? Our supreme civil court consists of many members: can uniformity be expected from a fluctuating body, as if all men were actuated with the same spirit? Yet in none of our law-books is there the slightest attempt to separate the chaff from the wheat. Lord Stair, our capital writer on law, was an eminent philosopher; but as he was not educated to the profession of law, his Institutes consist chiefly of decisions of the court of session; which with him are all of equal authority, though not always concordant: nor are the works of our later writers much more systematic. Such a mode of writing is infectious: Our law-students, trained to rely upon authority, seldom think of questioning

stioning what they read: they husband their reasoning faculty, as if it would rust by exercise.

Nor is the exercise of reasoning promoted in any degree by public professors. Our law is grafted on that of old Rome; which accordingly is properly made the first stage in law-education. The Roman law is illustrious for its equitable rules, affording great scope for acute reasoning; and yet that law is not taught by any professor, foreign or domestic, with any view to improve the reasoning faculty. Its rules of equity ought to be sedulously illustrated, as the corner-stone of law. Instead of which, nothing is presented to the young gentlemen but naked facts. Nor are even those facts selected that are more immediately connected with modern law: all are stated indiscriminately. What use, for example, to our students, is the chapter, *De lege fusia canidia tollenda*, for the chapter, *De excusationibus tutorum et curatorum*, for the intricate rules of succession, for the still more intricate rules that concern pactions, or for a thousand other particulars that have

no relation to any modern law, none at least to the law of Scotland. They load the weak mind with a heap of uninteresting facts, without giving any exercise to the judgement. Is it surprising, that the Roman law, so taught, is held to be a dry and fatiguing study *? Is there no cause to fear, that many of our law-students, contracting an aversion to study in general, will sink into idleness, and prove no less useless to themselves than to their country? Are there no traces to be discovered of this malady? Many, many.

A Scotch professor of Roman law ought to be well acquainted with the law of his own country, so as in every lecture to point where our law differs from that of old Rome. A course of such lectures, carried on with spirit and discernment, would draw great attention: The student whose immediate object was the Roman law, would be surprised to find the advance he had made in that of his own

* I should merit censure equal to what I do liberally bestow on others, did I did not except Mr John Millar, Professor of Roman law in the college of Glasgow.

country : how much more easy, and even pleasant, would his future progress be ? Instead of such lectures, he is dismissed by his professor without a single idea, but what is strictly Roman ; and such ideas are ignorantly applied by him to the law of his own country, as chance or conceit directs. Lamentable must this education be, when it can be traced in the writings even of our most celebrated authors. Will I be forgiven to draw out of my budget one instance ? Sir George Mackenzie, in his Institutions of the law of Scotland, follows literally the Roman division of contracts, into verbal, real, consensual, and scriptural. Would one require better authority ? And yet there is not the slightest foundation in our law for such a division.

In other sciences reason begins to make a figure : Why should it be excluded from the science of law ? The authority of men of eminence has deservedly great weight ; for nature gives it weight. But authority ought to be subservient to reason ; which the God of nature has bestowed on man, as his chief guide in thinking

thinking as well as in acting. The great Des Cartes commenced his philosophical inquiries with doubting of every thing: he endeavoured not to believe even his own existence, without an argument. This indeed was carrying scepticism to an extravagance: it was however erring on the safer side; for excess in scepticism is less unmanly, than excess in deference to authority: reason may profit by the former; it is stifled by the latter. I have ventured to carry the sceptical spirit into the present work, wishing, hoping, to rouse that spirit in others. I have perhaps indulged it too much. But by whom will my erroneous opinions be confuted? Not by blind followers, but by acute reasoners: and such will be indebted to me even for my errors; as exercise is the sovereign means for advancing the reasoning faculty to maturity. We submit implicitly to a work in which there is nothing to be corrected; and sink imperceptibly into indolence and inattention. But the detection of one error, makes the reader hunt for more; and the game is pursued with vigour. In that view, I would not prefer even Aristotle before the author of

L'Esprit des Loix. That celebrated writer abounds with observations, no less pleasing than solid. But a sprightly genius, prone to novelty and refinement, has betrayed him into manifold errors ; and the reader is never suffered to fall asleep.

The reasonings of Roman lawyers are always elegant, and generally correct. Their arguments however seldom reach to first principles. These were little thought of so early, even in the schools of philosophy ; nor is it yet common to trace an argument so far back. In the present essays, there are some slight attempts to reach first principles : who knows whether this small seed may not produce plenty of fruit ! I expect not approbation in my own time ; no not if my life were to be prolonged half a century. In law, as in religion, the student acquires from his preceptors a number of practical rules ; and in youth these rules make an impression so deep, as never to be eradicated. If this work make any impression, it must be on the *tabula rasa* of a new generation : upon them I trust it will make an impression ; and that prospect is my reward. I wish

wish to be useful : success depends not on me.

Were law taught as a rational science, its principles unfolded, and its connection with manners and politics, it would prove an enticing study to every person who has an appetite for knowledge. We might hope to see our lawyers soaring above their predecessors ; and giving splendor to their country, by purifying and improving its laws.

As my intention is only to give examples of reasoning, free from the shackles of authority, I pretend not to say what our law actually is, but what it ought to be.

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ELUCIDATIONS

RESPECTING

The COMMON and STATUTE LAW of SCOTLAND.

ARTICLE I.

Voluntary obligation by a minor without
consent of curators, and by a married
woman.

A Minor's bond without consent of his
curators, is held to be void by writers
on the Roman law ; and also by our
writers, who follow implicitly their
masters. I cannot submit to this doctrine. By
the common law of the Romans, no difference
was made between a major and a minor ; and
curators were given by the Pretor to a minor,
in order to protect him from being hurt by his
imbecility. A minor's bond therefore must in
Rome have been effectual at common law, no

A

less

less than a bond granted by a major; and the pretor had no power to annul such a bond, in contradiction to common law. His power reached no farther, than to supply defects in common law, and to correct any wrong that might happen by a too rigid application of it *. Thus, where a minor was sued for payment of a bond granted by him to his hurt without consent of his curators, it was incumbent on the pretor to sustain action; but then he rendered the bond ineffectual, by sustaining an exception in equity. And by the same equitable power, he afforded a *restitutio in integrum*, where there was no process to give opportunity for proposing an exception †.

A minor's bond in Scotland, though granted without consent of curators, cannot be null *ipso jure*; for it may happen to be highly beneficial to him. If challengeable, it requires in strict form to be taken out of the way by reduction. But as, in this country, a ground of reduction instantly verified, is admitted in the form of an exception, to save expence and delay; a minor who grants a bond without consent of curators, is presumed to be hurt by it; and the presumption is admitted by way of exception, because it requires no proof. This form has led our writers inadvert-

* l. 3. § 1. De justitia et jure.

† See l. 101. verb. oblig.; l. 43. oblig. act.; Heineccius, tit. Minor, § 495.

ently to say, that a bond granted by a minor without consent of curators, is void and null. And yet, such a bond is every day sustained against a reduction, upon evidence given that it is not hurtful to the minor. Now a deed that is void and null, cannot be supported by any evidence. Further, though the objection of hurt or lesion will be admitted in a suspension of such a bond; yet if evidence be brought of a valuable consideration, the bond will be sustained, and the letters be found orderly proceeded *. I add, that such a bond, if not challenged within forty years, will stand good against all objections; though it is clear, that a bond originally null, cannot become effectual by any length of time. These considerations make it evident, that a minor's bond without consent of curators, is not void, but voidable only.

. In Justinian's Novel 134. cap. 8. an obligation by a woman for behoof of her husband, is prohibited. We have taken the hint, and have extended it. "By our custom," says Lord Stair, "a wife's obligation for debt, or personal obligation, contracted during the marriage, is null †." That such a bond is voidable, is un-

* See 22d June 1627, Drummond; 11th December 1629, Gordon; 5th February 1631, Inglis. All collected by Dury.

† Institutions, book 1. tit. 4. § 16.

questionable; but I cannot admit it to be void, more than a bond by a minor without consent of curators. A bond by a married woman produces undoubtedly an obligation by the law of nature, or a natural obligation, as termed by Roman writers; and I find no statute, nor rule at common law, prohibiting such a bond, or declaring it void when granted. The law of Scotland, it is true, in order to protect a wife from being hurt by her commercial dealings, affords her an exception against such a bond, which she may use when she thinks herself over-reached. The exception protects her from payment; but if she do not use it, the bond is effectual in law. And that this is the doctrine of our law, will appear from the following considerations. First, it is not *pars judicis* to refuse action upon such a bond; the judge must sustain action, and pronounce sentence, if the exception be not stated. Second, if a married woman become cautioner in a bond for borrowed money, and obtain a security for her relief, she may unquestionably operate her relief by that security; and yet, if the cautionary obligation were void in law, the security could not subsist. Thus a man having granted an assignment to his wife for relieving her of a debt in which she was cautioner for him, it was decreed, that the wife might submit to the cautionary obligation, and insist on the assignment for her relief

lieff*. Third, if a wife have a fund appointed for her aliment exclusive of the *jus mariti*, her bond for furnishing will be sustained †. And in general, a bond by a married woman for a valuable consideration, will in every case be sustained. If so, the just notion of such a bond seems to be what follows. A woman under coverture seldom has occasion to deal in money-matters. The husband is the administrator of her effects, and is bound to provide her with all necessaries. Therefore where she grants a bond of borrowed money, her situation affords a presumption of imposition; which she may state by way of exception, because it requires no proof. But if the exception be removed, by giving evidence of a valuable consideration, the bond will be effectual. In that view, the case of a wife resembles that of a minor, or of a person interdicted. The only difference is, that a bond granted by a minor, or by an interdicted person, is good in law if the curators or interdictors consent; which removes the presumption of imposition. But a bond granted by a married woman, is exceptionable though the husband consent; because his consent removes not the presumption of imposition.

Here it may be observed, that when a ground of reduction is cut off by the negative prescrip-

* Stair, 18th July 1672, Watson *contra* Bruce.

† Stair, 23d February 1672, Neilson *contra* Arthur.

tion, it cannot be urged by way of exception, more than in a regular process of reduction. As it is admitted in the form of an exception, merely to save the expence and delay of a reduction; if it be not competent by reduction, as little ought it to be competent by exception. Hence the rule in the Roman law, *Temporanea ad agendum sunt perpetua ad excipiendum*, obtains not with us.

A R T.

ART. II.

What obligations are effectually conveyed by assignment.

A Debtor cannot relieve himself from his obligation by substituting another in his place, unless the creditor consent. As little can the creditor substitute another in his place, where the obligation is to pay to him and not to any other *.

In order to make obligations more useful, an indirect method of transmission was invented, which is a procuratory *in rem suam* †. But a procuratory *in rem suam* is, from its nature, confined to money-obligations, extinguishable by payment. If I give a mandate to receive from my debtor the money he owes me, he can have no just objection against paying to the mandatary; because such payment dissolves the obligation; and the mandatary, by my consent, may retain the money as payment of what I owe him. An obligation *ad factum præstandum* is very different. It is the same to me, whether I pay money to my creditor or to his mandatary; but it

* Stair, tit. Assignation, sect. 2.

† Sect. 3. eod.

is not the same to me, whether I perform personal service to my superior or to his mandatary. If I have obliged myself to lend my horse to John, there is a *delectus personæ*, and I am not bound to lend it to any other. An obligation to dispoſe land to James, will not bind me to dispoſe it to John. I purchase land under reversion to the vender, he cannot oblige me to rediſpoſe it to any other. I accept Alexander for my tenant, and grant a lease to him; he has no power to introduce another into the possession of my land instead of himself. Hence the maxim, That tacks and reversions are *stricti juris*; and that assignees are excluded, unless named in the deed.

With respect to tacks in particular, this proposition appears so clear, as to occasion some degree of wonder what could influence the court of session to make an exception with respect to life-rent-tacks. Lord Stair *, on the authority of Craig, and one or two decisions, lays it down, that life-rent-tacks may be assigned, though not mentioning assignees. His Lordship would have been puzzled for an answer to this plain question, What intitles a tacksmen to give any one a settlement on land that is not his property? And the same objection lies with respect to a tack for nineteen years. A tack is a mere personal right: it was not made real by the act 18. parl. 1449, which

* Institutions, book 2. tit. 9. sect. 26.

only declares, "That, for the safety and encouragement of poor people who labour the ground, their tacks shall be secure against a purchaser of the land." By what means secure? Not by converting a tack into a real right, contrary to its nature, and without necessity; but by a statutory prohibition, precisely as an entail is secure against the deeds of the proprietor. Now, if a tack be only a personal right, what intitles the tackfman to put any other in his place? and what is it that binds the proprietor, to admit any person to possess his land without his consent? This argument, founded on the nature of property, appears to me invincible. In short, I can discover no cause that impowers a tackfman, more than a reverser, to substitute another in his place.

A procuratory *in rem suam* is but a precarious right; for it bars not the cedent from receiving payment. To give a bond for borrowed money a more secure currency, a clause has been invented, taking the debtor bound to pay the sum to any person who shall be authorised by the creditor to receive payment; which is commonly expressed in the following terms, obliging the borrower to pay to the lender, or to his assignee. And thus, with the consent of the debtor himself, the assignee is intitled to sue for payment. Thus, an assignment of such a bond intimated to the debtor, makes a complete transmission of the *jus crediti*,

B

divesting

divesting the cedent *funditus* ; which is a substantial improvement in the commerce of money-obligations. The clause mentioned was too useful to be confined to money-obligations. It has been extended to obligations *ad facta præstanda* ; and hence a power to assign is frequently adhibited to tacks and reversions.

Every exception against the cedent is effectual against his procurator ; but where an assignment is consented to, none but real exceptions, such as arise from the nature of the right, ought to be effectual against the assignee.

There are however assignments that denude not the cedent. An assignment to rents of land, will bar the cedent from levying the rents ; but it will not bar the cedent from conveying the land itself, nor the purchaser from levying the rents *qua* proprietor of the land. There can be no indefeasible right to rents, otherwise than by disposing the property of the land, or by creating a real right upon it.

A R T. III.

A challenge against the author, in what cases sustained against the person who acquires from him.

A Challenge founded on a defect of right in the author, is essentially different from a challenge founded on personal circumstances. The former is made effectual by a declarator of nullity: the latter, by a reduction. A declarator of nullity concludes, that the author had no power to convey the subject; and therefore that the purchaser has no right: a reduction admits that the subject was conveyed; but concludes, that the purchaser did wrong in making the purchase, and therefore that he ought to be deprived of the subject. A declarator of nullity is accordingly a real action; and it is the nature of a real action to be effectual against every singular successor: a reduction is a personal action, which can only be effectual against the person guilty. The following examples will illustrate the distinction. Property is transferred by consent with delivery: force or fear may produce external expressions of consent; but the internal act, which is the capital part, will not be presumed, unless where a man is at liberty to act according to his own will.

B 2

Therefore,

Therefore, as there is no consent in the case of force or fear, the property of the subject is not transferred, though delivery be made; and the purchaser, though not accessory to the wrong, is deprived of the possession by a declarator of nullity, which is in effect the same with the *rei vindicatio* in the Roman law. Let us suppose now a subject to have been acquired by fraud. Fraud is no obstruction to consent, more than error is: on the contrary, it shews in what manner the disposer was deluded to consent, and to convey. Fraud then obstructs not the transmission of property; and has no effect but to found a reduction against the purchaser, concluding, that he ought not to hold a subject which he fraudulently acquired.

From these premises it is evident, that a declarator of nullity is effectual against every acquirer, not excepting a purchaser for a valuable consideration: the objection lies, that he purchased a *non habente potestatem*. A reduction is very different: it is founded on personal circumstances, and therefore cannot be effectual against a *bona fide* purchaser for a valuable consideration. To illustrate the latter proposition, I shall give a few examples.

I begin with a reduction on the head of fraud; as to which hear Lord Stair *. “ Fraud being

* Book. 4. tit. 40. sect. 21.

“ of a criminal nature, is not relevant against singular successors, not partakers of the fraud, but only against the committers of the fraud, and those representing them, especially as to feudal rights. The reason whereof is, to secure land-rights, and that purchasers be not disappointed. But in personal rights the fraud of authors is relevant against singular successors, though not partakers nor conscious of the fraud when they purchased: because assignees are but procurators, albeit *in rem suam*; and therefore are in the same case with their cédents. Yet in moveables, purchasers are not quarrelable upon the fraud of their authors, if they did purchase for an onerous equivalent cause. The reason is, that moveables must have a current course of traffic; and the buyer is not to consider how the seller purchased, unless it were by theft or violence, which the law accounts a *labes realis* following the subject to all successors; otherwise there would be the greatest encouragement to theft and robbery.”

The reason here given why the purchaser of moveables is not affected with the fraud of his author, is for the sake of commerce. But there is a better reason, founded on principles of law. A purchaser of land who completes his right by investiture, acquires the indefeasible property; and it is a rule of justice without a single exception, That no man can be deprived of his property

perty without his consent, unless as a punishment where he has committed a crime. This proposition is driven from the very nature of property; and consequently is equally applicable to the purchase of a moveable. "But the fraud of the cedent is relevant against the assignee," says his Lordship, "because an assignee is only a procurator." An assignment even *in rem suam* did not transfer the *jus crediti* when his Lordship composed his Institutions; and as the assignee could only insist in name of his cedent, every objection against the cedent was of course good against him. But as an assignment intimated is now held to be a *cessio in jure*, this variation places the purchaser of a *jus crediti* upon the same footing with the purchaser of a moveable or of land; and consequently ought to secure him from being liable for the fraud of his cedent. Yet to this day, fraud is made to operate against the assignee, precisely as in the days of Lord Stair; not adverting, that an assignment is at present a very different right from what it was formerly. Compensation is in a similar case: it is by custom made effectual against an assignee for a valuable consideration, because it was legally effectual when an assignee was only a procurator *. In this manner has our law in many particulars become a heap of inconsistencies: rules o-

* See Principles of Equity, edit. 2, p. 206.

originally well founded, are preserved in practice; not only after the causes that produced them have ceased, but causes inconsistent with them have been introduced.

There are certain grounds in equity, that extend a reduction even against parties who had no accession to the wrong. A reduction on the head of fraud, though it cannot reach a *bona fide* purchaser of land or of a moveable who has given a valuable consideration, will be sustained against a purchaser who has given no equivalent; on the following ground of equity, *Quod nemo debet locupletari aliena jactura*, which obliges him to yield the subject to the pursuer, or to pay a just price *.

Though an assignment has now the effect of a *cessio in jure*, yet where an assignment to a *jus crediti* has been procured by fraud, a reduction on that head is effectual against a creditor of the assignee, arresting in the hands of the debtor. This proceeds from the nature of an arrestment. An arrestment; like an inhibition, bars voluntary deeds only, not what are necessary, *i. e.* what the common debtor is bound antecedently to perform. A landholder, for example, sells his farm-victual: an arrestment laid in the hands of the tenants before delivery, but after the sale, will not bar the

* Stair, 18th December 1667, Auchinleck *contra* Williamfon.

common debtor from making delivery. To apply this doctrine to the case in hand, a man who by fraud has procured an assignment to a *jus crediti*, is bound in conscience to retrocess the cedent, as the proper reparation of the wrong he has done; and the retrocession accordingly is a necessary act, which cannot be prevented by an arrestment. For the same reason, where a man, conscious of his insolvency, purchases goods without any prospect of paying the price, a reduction on the head of fraud will be sustained against his creditors, arresting the goods in the hands of the person to whom they were delivered for his behoof *.

There is another reason more general, that makes a reduction on the head of fraud effectual, not only against an arrestment, but also against other legal diligence. This reason is fully explained in the Principles of Equity †; and is shortly what follows. “ That the man who by
 “ fraud, or other illegal means, has acquired a
 “ subject, is bound in conscience to restore it to
 “ the person injured; and therefore that a court
 “ of equity will refuse its aid to the creditors of

* Stair, Fountainhall, 22d December 1680, *Prince contra Pallat*; Dalrymple, Bruce, 18th January 1715, *Main contra Maxwell*; 8th December 1736, *Sir John Inglis contra Royal Bank*.

† b. 1. part 1. ch. 7. sect. 2. edit. 2.

“ the acquirer attaching the subject, who ought
“ not to demand from their debtor what he is
“ bound in conscience to restore to another.”
Thus, where land is purchased fraudulently, the
vender is intitled to exclude the creditors of the
purchaser from adjudging the subject. And there
is *par ratio* that the vender should exclude the
poinder of moveables purchased by fraud. But
where the execution is completed, and the pro-
perty transferred, without any obstruction from
the vender, he is left without remedy, except a-
gainst the fraudulent purchaser himself. For, as
above mentioned, it is an inviolable rule, that
property fairly transferred must remain with the
bona fide purchaser: he cannot be deprived of
his property without his consent, as no wrong can
be laid to his charge.

We proceed to other grounds of reduction.
An inhibition prohibits the debtor to sell land, and
others to purchase, in prejudice of the inhibitor.
An inhibition therefore is a *personal* prohibition
only, and is not a *real* impediment to the convey-
ance of land. The purchaser infest becomes pro-
prietor, and is now the vassal in place of his au-
thor. He is liable indeed to be deprived of his
purchase, having acquired it in contempt of legal
authority. But if, before an action of reduction
be commenced, he have sold the land, the new
purchaser will be secure: he is guilty of no con-
tempt of authority, because the person from

C

whom

whom he purchased was not inhibited. In a word, a reduction *ex capite inhibitionis* is merely a personal action, and cannot reach any one who has not contemned the inhibition. The only way for making an inhibition operate against singular successors, is to insist in a process against the first purchaser, which, rendering the subject litigious, prevents any to purchase from him.

If it be held, that the power a man has to alienate his land is taken from him by law when on deathbed, a reduction on the head of deathbed is upon that supposition a declarator of nullity, operating against every singular successor; and this was decreed in a case reported by Fountainhall *. But if it be held, that a man on deathbed retains the power of alienation that he had when in health, and that he is limited from alienating by the heir's privilege only, which seems to be the more sound opinion, a deed on deathbed is effectual against all the world, the heir only excepted; and it is effectual also against him if he bring no challenge within forty years. According to that opinion, the reduction, being merely a personal action, reaches the person only who acquired from the proprietor on deathbed, and not those who *bona fide* purchase from that person for a valuable consideration.

Minority and lesion make a ground of reduction

† 18th December 1697, Livingston *contra* Burn.

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only, and not, like force or fear, a *real* obstruction to a conveyance. A reduction on minority and lesion was accordingly sustained against the person who purchased from the minor, but not against one to whom the purchaser sold the subject *. Yet, for the reason above given, a reduction on this head of a disposition of land, is effectual against creditors adjudging the subject. And in the Dictionary † there are many decisions where that point is on all hands taken for granted.

If a purchaser refuse or delay to pay the price, the vender may either sue him at common law for the price, or bring a process in equity to reduce the bargain ‡. With regard to the latter, justice will not suffer the vender to be deprived both of his land and of the price. This bars not the purchaser from selling the subject, before reduction be raised against him; in which case the second purchaser acting *bona fide* will be secure. But the creditors of the first purchaser will be barred; because a court of equity will not permit them to attach by legal execution what their debtor cannot hold without paying the price. This in effect was found, December 1721, Selkirk *contra* creditors of her deceased husband. The case was this.

* 25th January 1728, Gourlay *contra* Gourlay.

† Vol. i. p. 581.

‡ Stair, 20th July 1675, Maitland *contra* Gight.

In a contract of marriage, the bride disposed to her future husband, in name of tocher, some houses in the town of Glasgow; and was provided by him in a life-rent annuity of 1000 merks. The husband died insolvent; and the widow brought a reduction of the disposition granted by her to her husband, because the life-rent annuity, which was the price, was by his insolvency rendered ineffectual. It was decreed, that the creditors were barred from attaching the houses till the pursuer's life-rent should be made effectual.

Hitherto of *bona fide* purchasers. Next of *mala fide* purchasers, who know of the challenge or exception that lies against the author. It is laid down above, that the fraud of the author will affect those who purchase from him, knowing of the fraud. For fraud, like other crimes, involves the accessories in the same punishment with the principal offender; and the receiver accordingly is held equally criminal with the thief. But it appears doubtful, how far accessories to slighter delicts are punishable by a civil court.

Of such delicts there are various kinds. First, A delict *contra bonos mores*; an act not wrong in itself, but wrong with respect to consequences, as tending to corrupt the morals of a people; such as, purchases by a tutor, curator, factor, agent, of debts due by the person for whom they act; purchases of pleas by members of the college of justice; *pacta de quota litis*, and such like. I discover

cover not in our practice, that the challenge which lies against the man who makes such a purchase, is extended against those who purchase from him, though privy to the wrong done by their author. Thus, though an advocate is not suffered to take any benefit from a purchase made by him of a depending process; yet the law does not militate against those who purchase from him, though knowing of the wrong.

Second, Wrongs done to the hurt of society, but not in so tender a point as that of corrupting morals; a prohibition, for example, to kill salmon at a certain season. The transgressor is punished by statute; but the person who purchases salmon from him, is not liable. It is only a statutory delict; and not so noxious as to affect the purchaser where the law is silent.

Third, Prohibitions calculated for the good of certain individuals, that have no bad tendency with regard to others. A man who purchases from a person inhibited, is laid open to a reduction *ex capite inhibitionis*. But the man who purchases from him is secure, even though he knew of the inhibition. He is indeed accessory to the wrong done by his author; but his conscience does not condemn him, because a legal wrong affects only the person who commits it. Linton feued to Millar land rented at L. 40 Scots yearly. The charter contains a clause, declaring, that the vassal shall not sell the land, without

out first making an offer to sell it to his superior at the price paid for the feu, with an additional sum for improvements : and any conveyance made by the vassal contrary to this provision, is declared null. The vassal having sold the land without making an offer to his superior, a reduction was brought against the purchaser by the superior, upon the medium, that he was in the knowledge of the provision in the feu-charter ; and therefore, that being accessory to the fraud of his author, his right ought to be reduced. The purchaser was disavowed, as not being answerable for the wrong done by his author *. An heir of entail, prohibited to sell, or to contract debt, is guilty of a breach of engagement by selling ; and the person who knowingly purchases from him is accessory to the wrong. But then the prohibition is hurtful to the public, by restraining the commerce of land ; and therefore, where such a prohibition is transgressed, the wrong is so slight as not to affect an accessory. Even where an entail is recorded, and complete in all its solemnities, yet if an heir entering fail to engross in his indentment the clauses of the entail, it is declared by the statute 1685, that a purchaser from him is secure, however well acquainted he be with the entail.

* 4th January 1757, Sir William Stirling *contra* Johnston.

Whether it would not be an improvement in our law, to subject accessories in the cases mentioned as well as in the case of fraud, merits consideration. A man of strict honesty will avoid the tempting an heir of entail to transgress his duty; and therefore it is not strictly honest to purchase from him. But our law has not yet acquired so much purity and refinement, as to bar purchases where the wrong is only statutory, and not a wrong by the law of nature.

A R T.

A R T. IV.

Delivery of a deed.

Paper, being a *corpus*, is a subject of property; and not less so for having a writing upon it. A manuscript must belong to some person; and none but the proprietor is intitled to hold the possession, or to avail himself of it. For example, none but the proprietor is intitled to produce a deed or obligation in process, in order to found a claim upon it.

Delivery of a deed respects the manuscript as a *corpus*; and the use of delivery is the same here as in other *corpora*, viz. to transfer the property.

Writings, as far as law is concerned, are of two kinds; one that serves to create a right or obligation; and one that serves for evidence only. A writing of the latter kind, whoever be the proprietor, may be called for as evidence, precisely as a witness may be called. This is the case of a notary's instrument, of a special service, of a general service, of a missive letter, and of many others.

With respect to writings of the first kind, I doubt whether any general rule can be given, for determining what of them require delivery,
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what not. But to approach the nearest we can to a rule, a distinction must be made between covenants and single deeds; as also between single deeds binding the granter, and single deeds binding the heir only.

A mutual contract or covenant requires no delivery between the parties. Paper bought to write the covenant upon, requires delivery; and being delivered to the contractors conjunctly, it becomes their property in common. This supercedes the necessity of any new delivery; for the paper cannot be more or less their common property by being written upon.

The solemnity of delivery is therefore confined to single deeds. And the question is, What necessity there is for that solemnity? A bond by which I bind myself to pay a sum to any person, is my property, supposing the paper upon which it is written to have been so. While it remains in my hand, I can cancel it, or throw it into the fire; having the same power over it as over any other thing that belongs to me. But delivery transfers the property of the bond, as a *corpus*, to the creditor; who is now intitled to use it as he pleases; to make it the foundation of a process for payment, or to throw it into the fire. I talk of a deed *inter vivos*. A deed of a testamentary nature is different: it must, like other moveables, pass from the dead to the living without delivery; otherwise it could never pass; for there is none to make delivery after the pro-

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prietor's death. And hence it is, that by the grantor's death the property of such a deed is *ipso facto* transferred to the person in whose favour it is conceived. And this holds not only in a testament, but in every deed that is not intended to be delivered while the grantor is alive, such as a bond or disposition reserving the grantor's life-rent. But such a deed differs from a testament in the following respect, that delivery of it to the grantee, establishes the right in him, leaving nothing in the power of the grantor but his life-rent only.

And this leads to consider a deed *inter vivos* remaining undelivered at the grantor's death, though intended to be made effectual without delay. Will it be made effectual by a court of justice, or is it void for want of delivery? This question admits no general rule; because different circumstances produce different conclusions. Some distinctions are necessary to put these circumstances in a proper light. I distinguish, first, a deed purely gratuitous, from a deed proceeding from a just cause or motive. And I next distinguish a deed purely gratuitous containing a clause dispensing with delivery, from a deed of the same nature without that clause.

I begin with the last case, because it throws light upon the rest. A gratuitous deed *inter vivos*, if it have not a clause dispensing with delivery, bears naturally the construction, that the
grantor

granter intended to make it instantly effectual by delivery; and his forbearing to deliver, affords a presumption of his having altered his intention. His forbearing to destroy the deed, affords no argument on the other side; because it may be fairly accounted for from neglect, or want of memory.

But in a deed *inter vivos*, a clause dispensing with delivery is a declaration, that the granter intends not to make the deed presently effectual. The delay therefore of delivery is no evidence of change of mind, even though he die in the *interim*. And if his mind continued the same to the hour of his death, the deed must pass to the grantee, and be effectual against the granter's representatives.

A remuneratory deed *inter vivos*, or one proceeding from a just cause, requires not a clause dispensing with delivery. The delay of delivery will not presume a change of mind; which would be unjust, or at least unreasonable. Such a deed therefore will, after the granter's death, be effectual without delivery: the property of it will pass to the grantee; and the representatives of the granter will be liable. A bond of provision to a child proceeds from a just cause, viz. a natural obligation to provide children. And therefore, even where the granter binds himself as well as his heirs, yet the forbearing to deliver will not presume a change of mind: the bond will be ef-

fectual upon the granter's death against his representatives.

An assignment to a bond, or a conveyance of any other subject, will be effectual, if there was any just cause for granting, though the assignment or conveyance remain with the granter till his death. It has accordingly been found more than once, that an assignment to a creditor for his security or payment, will, after the cedent's death, be effectual, though never delivered to the creditor. The case is more doubtful where the assignment is a pure gratuity. This case lies in the middle between a gratuitous bond *inter vivos* binding the granter himself, and a gratuitous bond *mortis causa*, binding his representatives only. Though a gratuitous assignment be framed in the present tense, that circumstance will scarce infer an intention to make the assignment presently effectual; for which reason the forbearing to deliver will not presume change of mind, at least not so clearly as the forbearing to deliver a bond binding the granter. This case appears extremely arbitrary, and forces the mind to look about for some determining circumstance. May it not be thought, that such an assignment to a near relation will be effectual without delivery; not where it is to a stranger, especially if the granter live long after executing the assignment?

A R T.

A R T. V.

Form of completing marriage by the law of Scotland.

F E W branches of our law are handled with less precision, than what particulars are necessary to complete a marriage. There is a darkness and confusion in our writers, from jumbling together three points that are clearly distinct. The first is, What solemnities are necessary to complete a marriage? The second, What circumstances are sufficient to presume, that marriage has been regularly solemnized? And the third, What circumstances are sufficient to oblige a party by a process to solemnize a marriage?

With respect to the first, Marriage required no solemnity before the time of Pope Innocent III. The bridegroom went to the house where the bride lived, and led her home to his own house; by which simple form, they became husband and wife. But a ceremony so slight giving occasion to many questions about marriage, both with regard to the parties and their issue, marriage in the church before the priest was established as an essential solemnity. Thus, though consent may, *in foro poli*, make a marriage; yet, in all civilized countries, certain solemnities are requisite to complete

plete a marriage ; and public utility makes these solemnities indispensable, in order to remove doubts about lawful issue, and to prevent the intricacy and uncertainty of parole-evidence. In England, a marriage must be celebrated *in facie ecclesiæ* : in Holland, there must be proclamation of bans : in Scotland, this proclamation is useful for the greater solemnity, and to give opportunity for objecting to the marriage ; but the priest's blessing appears to be the only solemnity that is indispensable.

With respect to the second point, Though a marriage had subsisted twenty, thirty, or forty years ; yet, if called in question, it was necessary, by the original law of this kingdom, to bring evidence of the solemnization. To make so important a fact as marriage to depend for ever upon oral evidence, was stretching law beyond the bounds of reason and common sense ; and the hardship was corrected by act 77. parl. 1503, setting forth, That widows, in prosecuting the brieve of terce, were often embarrassed by being obliged to prove their marriage ; therefore enacting, That if the marriage be not objected to in the man's life, it shall be sufficient to obtain possession of the terce, that the pursuer was habite and repute to be the man's lawful wife during his life, “ until it be clearly decerned, and sentence given, that she was not his lawful wife.” This act of parliament has been justly extended in practice,

tice, to secure a husband in his courtesy ; to prevent children from being held as bastards ; and, in case of desertion after some years cohabitation, to save the trouble of proving, that the marriage was regularly solemnized. This presumption in favour of marriage obtains in England as well as here ; and from the nature of the thing, must obtain in every country where law is a science.

With respect to the third point, viz. What circumstances are sufficient to oblige a party by a process to solemnize a marriage, I observe, that among the Romans, mutual consent to solemnize marriage at a time specified, termed *sponsalia*, did not oblige the parties to complete the marriage ; subjecting only the party who repented to a claim of damages. Afterward, either party might draw back, upon forfeiting the arles ; and by a law of the Emperor Leo, it was declared, that the *sponsalia* might be fortified with a penal stipulation *. We probably borrowed this law from the Romans. Balfour (Marriage) says, that a contract to complete the band of marriage within a day named, under the penalty of a certain sum to the King, and another sum as damages to the party willing to perform, is lawful and effectual. And Spottiswood (Marriage) is of the same opinion. But our later practice admits

* Voet De sponsalibus, sect. 12.

change of mind ; and action is not sustained for the penalty. But there is no reason why damages should not be due *. The law of Holland is different. A mutual promise of marriage even *de futuro*, is a good foundation for an action to compel the refractory party to complete the marriage, unless there be a mid-impediment by a subsequent marriage regularly solemnized. In England the same law obtains. Though a private contract, without the priest's blessing, makes not a marriage, yet such contract may be enforced in the spiritual court †. In the law of Scotland, though a private contract is not binding to oblige either party to solemnize marriage ; yet such a contract, with a subsequent *copula*, is sufficient. For though there be *locus pœnitentiæ* after such a contract *rebus integris* ; yet, where a *copula* follows upon the faith of such a contract, it would be unjust to permit either of the parties to draw back ; especially the man, when the woman has surrendered her person to him. And accordingly an action is given in the spiritual court, as in England, to oblige the refractory person to solemnize the marriage. Craig explains the nature of this action, which concludes against the party drawing back, that he or she shall be obliged to solemnize the marriage. The

* Dictionary, *Locus pœnitentiæ*, in *fine*.

† New Abridgement of the law, vol. 3. p. 575.

consequence is, that upon refusal, the marriage is declared complete; and the decree of the commissaries stands in place of the solemnity. “Commissarii, viri acuti, successionem bonorum nobilium concesserunt liberis Edwardi Younger, licet matrimonium nunquam fuit contractum, neque banna proclamata; ea ratione, quod cum Edwardus, sub fide futuri matrimonii, eos liberos suscepisset, materque apud commissarios causam obtinuisset, ut Edwardus matrimonium promissum implere cogeretur, eo recusante, perinde habuerunt ac si eam in uxorem duxisset, liberisque bonorum mobilium executio sive hereditas adjudicata est *” And Lord Stair observes another case †, where a man was found obliged to solemnize the marriage, seeing he had children by the woman under promise of marriage.

From some loose expressions of Lord Stair in the title of Marriage, an opinion has prevailed of late years, that a promise of marriage, with a subsequent *copula*, are alone sufficient to constitute marriage, without necessity of the minister’s blessing, or of any other solemnity. And what probably has paved the way to that opinion, is, that among Protestants marriage is not held to be a sacrament; from which it has rashly been infer-

* Craig, lib. 2. dieg. 18. § 19.

† Institutes, new edition, p. 26.

red, that there is no necessity for a minister. But that this is an erroneous opinion, will appear from the following consideration. If a promise of itself be not effectual, the subsequent *copula*, an unlawful act, can never be considered as a legal solemnity, sufficient to complete the marriage. The *copula* cannot regularly have any other effect than to bar repentance; and consequently to oblige the party refractory to perform the promise. Nor is this opinion consistent with the spirit of law in any civilized country concerning marriage. Marriage produces many important consequences. It ascertains the condition of the married couple, of their children, and of the right these children have to succeed to their relations. It may have an effect with respect to the succession to the crown itself, the most important question of all that concern civil society. Our law, for these reasons, dissatisfied with the private solemnity of carrying the bride to the bridegroom's house accompanied with her friends, though a public act, required the solemnity to be performed by proclamation of bans, and by mutual consent given *in facie ecclesie* before the priest, and completed with his blessing. Now, to hold a promise of marriage, *cum copula*, two acts of the most private nature, and most uncertain proof, to be equal to a marriage regularly solemnized, is to overturn the whole system of our law with regard to marriage, and to render it much more uncertain,

uncertain, than even the *inductio in domum mariti*. The pernicious effects of this opinion reach still farther. For at that rate, the most solemn marriage will not secure a woman even of the highest rank, nor her children: a low woman appears, who succeeds in proving a promise *cum copula* by witnesses of her own rank, perhaps engaged privately to partake of the spoil. What a dismal scene does this produce!

The proclamation of bans proves, to my conviction, that a promise *cum copula* makes not an actual marriage. The intention of proclamation is, to invite people to forbid the bans, if they have any legal objection. A promise of marriage will not intitle one to forbid the bans, because of *locus pœnitentiæ*; and if a promise with *copula* make an actual marriage, the woman's failure to appear at the proclamation, to claim the man as her husband, and to forbid the bans with another woman, will not annul her marriage. At that rate proclamation is of no use. An additional argument may be drawn from the above-mentioned act of parliament. Cohabitation as man and wife makes not a marriage; but only infers, that the marriage was regularly solemnized, unless the contrary be proved. To disprove the marriage, there is always access to the oath of party; and consequently, by that statute, cohabitation is not sufficient without the established solemnity. But a promise *cum copula* can never be stronger than

cohabitation as man and wife, which is a mutual acknowledgement of marriage *rebus et factis*, and often by express words. This is at least equivalent to a promise: the *copula* is presumed from cohabitation; and if there be children, is certain.

It would appear from a case observed by Durie *, that even a decree of the commissaries is not sufficient to complete the marriage. Margaret Craig having obtained a decree of the commissaries of Edinburgh against Oliver Sinclair, to complete the band of marriage with her before the face of Holy Kirk, he gave bond to solemnize the marriage within a day specified, and, in case of failure, to pay her 500 merks. This bond being put in suit, it was alledged for Oliver, that by the decree he was the pursuer's husband, and that she could not have action against her own husband. This alledgeance was repelled, because till the marriage should be solemnized, he was not actually her husband. This judgement was agreeable to the decree of the commissaries decerning the man to solemnize the marriage. But as it is not in the power of any judge to force the will, I should imagine, that a decree obliging the parties to solemnize, and upon failure, that the marriage should be declared complete, would make an actual marriage.

* Craig *contra* Sinclair, 16th December 1628.

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However that be, the decision shews the sense of the nation at that time, that a promise *cum copula* is not equivalent to an actual marriage.

I conclude this article with a remarkable decision, 15th December 1752, Alifon Pennycook *contra* John Grinton and Anne Graite, which is as follows. In February 1748, Alifon Pennycook brought a process before the commissaries of Edinburgh, against John Grinton, setting forth, That she had born a child to him under promise of marriage; and concluding for maintenance of the child, and for L. 100 Sterling of damages for his debauching and leaving her. The libel being referred to his oath, he acknowledged the child, and his promise of marriage before he had carnal dealing with the pursuer. The process was discontinued till January 1751; during which interval, John Grinton, finding that the pursuer had damages only in view, thought himself at liberty to propose marriage to Anne Graite; and she and her father having agreed to the proposal, the marriage was solemnized openly, but without proclamation of bans. There was a meeting of friends, a marriage-dinner, and a formal bedding: the new-married couple went publicly to church in that quality, continued to cohabit as husband and wife, in the neighbourhood of Alifon Pennycook, without any challenge from her; and a child was procreated of the marriage.

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This moved Alifon Pennycook to vary her attack. Deserting her depending process, she, in January 1751, brought a new process before the commissary-court, libelling upon the promise and *copula*; subsuming, That, notwithstanding thereof, John Grinton had not only deserted her, but had committed adultery publicly with another woman; and therefore concluding, that John Grinton and she should be declared married persons, and the child procreated betwixt them a lawful child; also concluding, that because of his notour adultery, she should be divorced, and intitled to all the privileges of a widow, as if he were naturally dead. In this process, the commissaries found it proved by the defendant's oath, mentioned above, that he had carnal dealings with her under promise of marriage, and that he had a child by her: therefore found the marriage proved; declared the defendant and pursuer husband and wife, and the child a lawful child. But as to the conclusion of divorce, they permitted the pursuer, before answer, to prove the facts and circumstances libelled for inferring the same. This process, with a counter process, at the instance of Anne Graite, for declaring her marriage with John Grinton, being brought before the court of session by advocacy, it was pleaded for John Grinton and Anne Graite, that a promise *cum copula* may, *rebus integris*, found an action to oblige the party to complete the marriage; but is not

an actual marriage, to void a subsequent marriage lawfully contracted. The judges were almost unanimous, that a promise *cum copula* makes a complete marriage; and therefore they repelled the reason of advocacy, and remitted the cause.

As John Grinton's marriage with Anne Graite was so far clandestine as that it proceeded without proclamation of bans, it deserves consideration, what weight ought to be laid on the omission of that solemnity. Had the bans been proclaimed, the pursuer ought to have appeared to forbid the bans. And supposing her not to have appeared, the marriage, in my apprehension, must have been unexceptionable. But since there was no proclamation of bans to give the pursuer opportunity to appear for her interest, it may be justly doubted, whether her claim did not remain entire to operate a dissolution of the subsequent clandestine marriage, and to compel John Grinton to solemnize the marriage with her. I am verily persuaded, that this particular had weight with the judges, though it entered not into their reasoning, nor is expressed in the judgement. If a case of this kind be brought again before the court, where the bans have been regularly proclaimed, and every other solemnity used, I cannot allow myself to think, that the judges would be so harsh, as to void the marriage upon no better ground than a promise of marriage to another woman *cum copula*.

A R T.

A R T. VI.

Provision of conquest in a contract of marriage.

WHere a man is possessed of an estate sufficient for providing his wife and children, there is no occasion for a provision of conquest. But men of business often marry upon the faith of future acquisitions, and upon these the wife depends for a provision to herself and to her issue. There, a provision of conquest is necessary; and for that reason, extremely favourable. Some contracts of marriage have a mixture of both, as where a man provides the small stock he hath to his wife or children, and also his future acquisitions.

A subject is not termed conquest merely for having been purchased during marriage. Nothing is held to be conquest, but what is an accession to a man's fortune, making him *locupletior*. A subject purchased with money acquired by industry or economy, is in the true sense conquest. But land, or any other subject, purchased with borrowed money, is not conquest; except as far as the subject may be of greater value than the price paid for it.

This being the true notion of conquest, even

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in the common sense of mankind, it follows, 1st, That whatever subjects a man may acquire during a marriage, yet these are only held to be conquest as far as they exceed in value what the man was possessed of at the date of the contract *. 2d. They are only held to be conquest, as far as they exceed in value the debts which the purchaser found it necessary to contract in order to pay the price †.

Having settled the meaning of conquest in general, the first particular I begin with is, the import of the different clauses in common use; some more extensive, some less, according to agreement. And with respect to every provision of this sort, one negative rule holds, That being partly calculated to excite the wife's frugality and industry, it is not extended to what devolves on the husband by succession, unless so expressed ‡.

What subjects are comprehended under a clause of conquest, depends on the will of parties, signified by the words of the clause. A provision to a wife, "of the liferent of all lands" and annualrents to be conquest during the "marriage," was found to comprehend a bond

* See Stair, b. 3. tit. 5. § 52.

† Stair, *ibid.*

‡ Stair, 29th January 1678, *Stuarts contra Stuart*; July 1730, *Mercer contra Mercer*.

bearing interest, though having no clause for interest *. At that time bonds bearing interest were held to be *feoda pecuniæ*, and consequently a sort of annualrent-right. But after such bonds were rendered moveable by statute, the court gave a different opinion. A liferent provided to the wife, “of what lands, teinds, “and annualrents, should be conquest during the “marriage,” was not extended to moveable bonds bearing interest †. But a liferent provided to a wife, “of a third part of all lands and “heritages that should be conquest during the “marriage,” was extended to a bond including executors, as being heritage ‡. A liferent provided to the wife, “of all lands, annualrents, goods, and “gear, that should be conquest during the marriage,” was not extended to moveable bonds ||. A provision, “of all goods and gear to be conquest during the marriage, to the children that “should be procreated of that marriage,” was not extended to houses, because lands and heritages were not mentioned **.

A man bound by contract of marriage to in-

* Dury, 20th February 1629, Douglas.

† Harcarfe, Decif. 342.

‡ Harcarfe, Decif. 343.

|| Stair, 15th July 1673, Robison *contra* Robison.

** Fountainhall, 5th February 1696, Young *contra* Young.

feft his wife in all future conquests, acquired land holding burgage, which, by acts of the town, could only be enjoyed by burgefles, and their heirs-male. It was decreed, that his heir-male fhould make good to her the rents for her life *. For the land was undoubtedly conquest; and though ſhe was barred from poſſeſſing the land, there was nothing to bar her from poſſeſſing the rents.

When we conſider a claufe of conquest with reſpect to its import, it is not ſufficient to ſay, that ſuch and ſuch ſubjects are comprehended in it: we muſt alſo be able to ſay, that theſe ſubjects were acquired during the marriage. This point is ſometimes doubtful; as where a purchaſe, inchoated before the marriage, is completed during it. It is not eaſy to give a general rule, for determining a point frequently involved in circumſtances. Questions of this nature commonly occur about land, to which there are titles of different kinds. All I can ſay in general is, that acquisition of the ſovereign title of property, is the determining circumſtance. If that was in the huſband before the marriage, the acquisition of collateral or inferior rights during the marriage, will not be reputed conquest. And the property will be reputed conquest, if it be acquired during the marriage, whatever collate-

* Hadington, 14th March 1623, Skene *contra* Forbes.

ral or inferior rights were formerly in the husband. Thus, a provision to the heirs of a second marriage, "of lands that should be acquired " during the marriage," was not extended to land to which the husband had a title of property before the marriage; though several collateral rights were purchased during the marriage. For even supposing these to be preferable titles, yet the parties certainly did not intend to bring under such a clause any land to which the husband had already a title of property. Nor were these purchases during the marriage brought under the provision of conquest; because neither could it be the meaning of parties, to split different titles to the same subject among near relations, to produce discord and law-suits among them *. On the other hand, a man, possessed of the life-rent of land at the date of his contract, having afterward made a purchase of the property, the land, after his death, was decreed to fall under the provision of conquest †. And a man who was bound to invest his wife " in all lands and herita-
" ges that should be conquest during the mar-
" riage," having first acquired tacks of certain lands, which fell not under the provision, and afterward the property of the land; the relict

* Harcarfe, Decis. 352. See Dury, 30th June 1629, Lady Dunfermline.

† Fountainhall, 12th December 1707, Fergus *contra* Burrel,

was found intitled to liferent the land. But the benefit of the tacks was subtracted; because so far the lands could not be reputed conquest *.

We come next in order to say, with what debts a provision of conquest is burdened. Supposing the whole subjects, heritable and moveable, that shall be conquest during the marriage to be provided, this provision must of course be burdened with all the debts contracted during the marriage. For, as above laid down, subjects acquired during the marriage, are only held to be conquest, as far as the purchaser is thereby *locupletior*; and he is not *locupletior*, if he have contracted debt for paying the price. But supposing the subjects acquired during the marriage to be sufficient for all the debts contracted during that period, a provision of heritable subjects will only be burdened with heritable debts, and a provision of moveable subjects, with moveable debts †. If there be no separate fund for paying the debts, the provision, were it even of land only, must be burdened with the whole; for, as observed, nothing is held to be conquest, but what is free after payment of debts.

To prevent mistakes, I must observe, that the debts I am talking of, are those only where the money has been applied for making purchases

* Durie, 12th March 1628, Lady Dunfermline.

† Stair, 23d December 1668, Smith *contra* Muir.

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during the marriage. If a debt be contracted, and the money be gifted to a relation or friend, this debt cannot burden a provision of conquest, if the debtor have any other funds for payment. Or if, during a second marriage the conquest of which is provided to the wife or children, the husband contract debt, and apply the money for purging incumbrances upon his estate descendible to the heir of the first marriage, the provision will not be burdened with that debt. The reason is, that the subjects falling under the provision, having been acquired without the aid of this contraction, make a real accession to the man's estate ; and are therefore properly conquest. Nor is there any reason for burdening a provision with a debt that has not contributed to the acquisition of the subjects provided.

Where the whole moveables are provided, or the whole heritable subjects, there can be no difficulty about the debts. The provision must be burdened with debts of its own kind. But what if a single species only be provided, such as lands, or bonded debts ? The provision, as appears to me, must be burdened with a proportion only of the debts. If land for example that shall be conquest, be provided to the wife in life, or the children in fee ; and, at the dissolution of the marriage, there be not only land, but also heritable bonds ; the whole heritable debts must not be laid upon the land : the other heritable subjects

jects must bear a proportion. The like when moveable bonds only are provided: the other moveables must contribute to pay the moveable debts.

There is a specialty with respect to a provision of land. Land acquired during the marriage, must pass to the wife or children *cum suo onere*; that is, with the burden of heritable bonds secured upon it. The wife, provided to the liferent, must pay the interest; and the children, provided to the fee, must pay the principal; without being intitled to any relief out of the other heritable subjects that have been acquired during the marriage. The court has gone farther in some instances: it has found, that land purchased during a marriage, must be burdened with what part of the price remains still due to the vender, though due by a moveable bond, but specifying the sum to be part of the price *. It has probably been thought, that the land could not be entirely conquest, while any part of the price remained unpaid. But this, I think, is too strict. Supposing the land to be the only subject purchased during the marriage, it must no doubt be burdened, not only with what remains due of the price, but also with all the other debts. But supposing other subjects to have been acquired beside the land, I discover no good reason for laying the

* Durie, 24th January 1629, Lady Renton; Stair, 20th December 1665, Lady Kilbucho.

price entirely upon the land. Let it be supposed, that the husband, soon after the marriage, being tempted with a beneficial purchase of land, borrows money to buy it. Being engaged in profitable business, he afterward buys houses, obtains adjudications, and lends sums upon personal bonds. Dying in this condition, it must be admitted, that the land he acquired is, in the strictest sense, conquest. I am therefore inclined to think, that the moveable subjects ought, in the first place, to be applied for paying the price as a moveable debt; and if these be not sufficient, that the remainder of the debt be allocated proportionally upon the land, and upon the other heritable subjects.

The point of the greatest intricacy, is, How far the granter is limited in the exercise of his property by a provision of conquest. As to this point, special regard must be had to the intention of the parties. A provision of what shall be acquired during a marriage, to a wife in life, or to children in fee, will not readily be so interpreted, as to deprive the man of his inherent power, *qua* proprietor, to manage and dispose of his effects. If he lend money during the marriage, he may take payment; and if he buy a horse, or even land, he may dispose of it: a provision of conquest will be no impediment *. For,

* See Stair, b. 3. tit. 5. § 52.; Durie, 26th November 1629, Lady Dunfermline.

as such provision respects the dissolution of the marriage, and operates not till the husband's death, nothing is held conquest but what remains in his *hereditas jacens*. There is therefore nothing in the nature of such a provision, to prevent the husband from aliening by a deed *inter vivos* any subject acquired by him during the marriage. The common law accordingly admits no objection to an alienation divesting the granter, whatever may have been his motive. But were such alienations to be countenanced without limitation, a provision of conquest in a marriage-settlement, however salutary, would prove a very slender security. The husband cannot indeed counteract his engagement directly; but he may do the equivalent indirectly, by aliening to his favourites all that he hath acquired during the marriage. A court of equity takes more liberty, in order to fulfil the rules of justice. It will not bar deeds done in the course of ordinary administration: nor will it even bar deeds done without a valuable consideration, provided they be rational, proceeding from an honest motive, with no intention to disappoint the wife and children. To give more indulgence, would be to suffer the husband to do wrong with impunity. Common law regards only the granter's power when he makes a deed; but equity regards his intention, and will reduce every deed that proceeds from a fraudulent or unjust motive. When a man acts indi-

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rectly to evade a contract, or a statute, he is said, in law-language, *fraudem facere contractui aut legi*; and it is the province of a court of equity to void unjust acts. I give examples. A woman in her contract of marriage being provided “to the liferent of what subjects the husband should conquest, and of what sums he should receive in payment during the marriage,” was not intitled to the liferent of sums paid to the husband during the marriage, which were apply’d by him for purging incumbrances upon his estate *. For here the money was not extant at the dissolution of the marriage; and the application of the money to purge incumbrances was a rational act, and not a *fraus facta contractui*. A man who became bound to provide his wife to the liferent “of all sums that should be conquest during the marriage,” lends out sums thus acquired, and takes the debtors bound to pay the same to his younger children. The wife has no claim to the liferent of these sums, which being no more but a competent provision, will not be held as done intentionally to disappoint the liferent †. On the other hand, where the liferent “of all sums that should be conquest during the marriage,” was provided to the wife, a disposition by the husband of considerable sums to his

* Harcarfe, Decif. 398.

† Durie, 10th February 1629, Oliphant *contra* Finnie.

second son, was decreed fraudulent, so as to intitule her to the liferent of these sums *. The like where the husband, in order to disappoint his wife's liferent "of all lands that should be conquest during the marriage," took the disposition of land purchased by him to his infant heir †.

Where the husband converts subjects that fall under the provision into subjects that fall not under it, without necessity, and without profit, such acts will be deemed fraudulent. Thus, goods and gear acquired during the marriage, and provided to the wife in liferent, being converted into bonds which were not provided, the liferent of these bonds was given to the widow ‡. The same rules obtain in a provision of conquest to the heirs or children. Deeds done intentionally to evade the engagement, are voided; but acts of rational administration are not voided. Thus, a liferent to a second wife is effectual against a provision of conquest to the bairns of the first marriage ||. And for the same reason, competent provisions to the children of a subsequent marriage, will also be effectual.

In considering how far a man is limited by a

* Durie, 16th July 1625, Knox *contra* Brown.

† Durie, 3d July 1627, Earl of Dunfermline *contra* his mother.

‡ Stair, 15th July 1673, Robison *contra* Robison.

|| Stair, 16th June 1676, Mitchell.

provision of conquest, I once thought, that his powers are more limited with regard to his wife, than with regard to his children; that the wife, being, in the strictest sense, a creditor, is intitled, in all events, to have the obligation fulfilled to her; but that the children, being only heirs of provision, are not intitled to bar any deeds but what are fraudulent. But, upon revolving the subject more attentively, there appears no ground for a difference. A provision of conquest intitles the widow to every subject falling under the provision that belonged to the husband at the dissolution of the marriage. But with respect to subjects acquired, and aliened by him, during the marriage; these, in terms of the provision, fall not under conquest; and therefore she has no title to challenge any alienation of that kind, unless she can qualify it to be fraudulent; and the children evidently have the same privilege. Perhaps it may be thought shallow, ever to have entertained a doubt about this point; but I hazard the imputation, to prevent others from losing time in doubting as I did.

A clause of conquest in favour of the wife or children, limits not the husband with respect to others. Where the settlement is extended beyond these parties, it is but a simple destination, alterable at the pleasure of the maker *.

* Stair, 1st and 21st December 1680, Anderson.

A R T. VII.

Seal of Cause.

WHen a village, by a charter from the crown, is erected into a burgh-royal, a burgh of regality, or a burgh of barony, the inhabitants are *eo ipso* incorporated into a body-politic, enjoying all the privileges granted by the charter; and their right of burghership is communicated to their descendents, with all the privileges consequent upon it. At the same time, the increase of the burgh being always in view as well as its perpetuity, a power is granted in the charter to the magistrates, to the lord of regality, or to the baron, to admit strangers into the corporation, and to make them burghesses.

As such erections are made for the sake of commerce, the erecting the inhabitants of a village into a corporation, is understood to imply an exclusive privilege to the burghesses, of exercising merchandise and manufactures within the burgh. The clause commonly is, "That the burghesses shall have free liberty of commerce; and that there shall be liberty of admitting bakers, tailors, shoemakers, &c. with power to the said artificers to exercise their respective crafts, as freely as is done in other burghs." It is accordingly

cordingly laid down in the New Abridgement of the law *, “ That a corporation is an artificial
“ body of men, composed of divers constituent
“ members, *ad instar corporis humani*; the li-
“ gaments of which body-politic, or artificial bo-
“ dy, are the franchises and liberties thereof,
“ which bind and unite all its members together.
“ And the whole frame and essence of the corpo-
“ ration consists therein.”

It is a principle of law, That a corporation, or body-politic, cannot be created by any but by the crown. See the book above quoted †; where it is said, “ That a corporation created by
“ the mayor and common council of London,
“ is not good without the King’s charter.” It is therefore to me clear, that a seal of cause granted by the magistrates of a royal burgh, by a lord of regality, or by a baron, to a craft or trade, the weavers, for example, or the masons, cannot have the effect of erecting them into a corporation. Nor do the seals of cause I have perused, appear to have been intended for making an incorporation. No more is done, but to delegate to the craft itself, the privilege of admitting new members; a privilege that the granters have by the charter of erection; to empower also the craft to make by-laws; and to have a box and common good for the use of

* Tit. Corporation, p. 499.

† Tit. Corporation, p. 501.

their poor. The seal of cause granted 31st of January 1475, by the magistrates and town-council of Edinburgh, to the weaver-craft, has no clause erecting them into a corporation. It goes no farther, than to regulate the common concerns of the craft, and to bar unfreemen. In the same strain run the seals of cause granted to the hammermen, 2d May 1483; to the tailors, 26th August 1500; to the cordiners, 6th December 1513; and to the goldsmiths, 20th August 1581. In the seal of cause, *anno* 1505, granted by the magistrates and town-council of Edinburgh to the surgeons and barbers, there are no words erecting them into a corporation: a set of by-laws proposed by the craft are ratified, and no more is done. By an act of the town-council of Edinburgh, the surgeons and apothecaries are erected into one community. But to supply the defect of power, the act was confirmed by Charles II. and ratified in parliament, 22d August 1670.

By an act of the same town-council, *anno* 1684, the bonnetmakers and listers are erected into one body and incorporation perpetually in all time coming. If this was intended to create a legal corporation, it was undoubtedly *ultra vires*. But probably no more was intended, but to conjoin two weak crafts into one, in order to lighten the burden of the common expence.

A R T. VIII.

Whether the property of goods sold be transferred to the purchaser by delivery, though the price be not paid.

BY the Roman law, delivery of the thing sold presumes not the vender's will to transfer the property, but only to intitle him to demand the price; § 41. *Instit. De rerum divisione*; l. 19. ff. *De contrahenda emptione*. And Vin-
nius, in his commentary on the Institutes, mentions it to be the opinion of the doctors, that delivery without receiving the price, will not infer an intention in the vender to transfer the property, unless evidence be given, that he was willing to trust the purchaser.

Is this doctrine adopted in our practice? Let the reader judge for himself. And, first, with respect to heritable subjects, where delivery is made by an instrument of seisin, the instrument infers transference of the property; it being a rule in our law, That infeftment cannot be qualified by any presumption, nor with any condition or provision, but what appears on the face of the deed.

Next, as to moveables. An agreement to delay payment of the price to a future time, must

be intended for the benefit of the purchaser : but it would be no benefit, if the use of the subject were in the interim with-held from him. Therefore, where payment is agreed to be delayed, delivery must infer a transference of the property.

Where there is no paction to delay payment, what if the vender, after delivery, forbear to demand the price for a considerable time ? Such delay implies, that he was willing to trust the price till he should have occasion for it ; which, according to what is now said, infers, that he intended to transfer the property upon delivery.

Where the goods purchased are intended for immediate use, as corn for feed, delivery can have no other meaning, but to transfer the property ; for the vender cannot mean to retain the property of a subject that is immediately to be annihilated.

But what shall be said of a sale with delivery, where the subject is not intended for immediate use, nor a paction for delay of payment. Can the vender return next day, or next hour, to demand the subject as his property, if the price be not instantly offered ? It is natural for the vender to say on delivery, whether he be willing to delay payment. Therefore, if he be silent about what is his own concern, is it not the more natural construction, that he is willing to transfer the property, and to delay payment of the price till

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he have use for it? This seems to be the proper construction, even at common law.

But were it a rule at common law, as Vinnius holds, that delivery, without receiving the price, will not of itself infer an intention to transfer the property; yet that rule cannot be admitted in any commercial nation, because it would be a great obstruction to the commerce of moveables. Suppose a moveable had passed through a hundred hands, by buying and selling, yet the last purchaser would lie open to have the subject taken from him, if any antecedent purchaser, without being trusted, had failed to pay the price. Nor is it any hardship upon the vender that delivery should infer a transference of the property; for if he be not willing to trust the price, let him hold the subject till he obtain payment.

Attending to the foregoing reasoning, Lord Stair appears to be well founded in the following proposition, laid down by him, tit. Sale, § 2.
“ Sale being perfected, and the thing delivered,
“ the property thereof becomes the buyer's;
“ and there is no dependence of it till the price
“ be paid, or secured, as was in the Civil law;
“ neither hypothecation of it for the price.”

A R T. IX.

Division of rent between the fiar and representatives of a liferenter, and between the heir and executors of a land-proprietor.

Rents originally were paid in kind. A grafs-farm paid cattle, butter, cheefe: a corn-farm paid wheat, barley, oats. A grafs-farm yields daily profit: the rent however is made payable at Whitfunday and Martinmas; because more frequent payments would be troublesome to the landlord as well as to the tenant. A corn-farm yields no profit till the corns be reaped; and therefore the rent, when paid in kind, cannot be exacted before Martinmas.

When gold and silver came to be so plentiful as to enable a tenant to pay money-rent, it was natural to stipulate, that the rent of a corn-farm should be paid at Whitfunday and Martinmas, as the rent of a grafs-farm had always been. And thus, Whitfunday and Martinmas, coming to be the ordinary terms of paying rent, were denominated the *legal terms*. But as money-rent admits any terms of payment as parties can agree, it came to be frequent in leases to stipulate rent

at the commencement of the lease, before the tenant could reap any profit, termed *fore-hand rent*, and sometimes long after the crop was reaped, termed *back-hand rent*. And in opposition to the legal terms, such terms of payment obtained the name of *conventional terms*.

Where a yearly annuity is paid to a liferenter, or to any person, the annuitant is understood to be intitled to a proportion daily for subsistence; though, for the sake of convenience, the sum be made payable but once or twice a-year. Therefore, at whatever time of the year the annuitant dies, his representatives have right to a part of the annuity corresponding to the number of days he lived. A liferenter of land is in a different state. The possession is yielded to him; and he acts in every respect as proprietor, granting leases, and stipulating certain terms for paying the rent. Every crop accordingly that arises during his possession, belongs to him, or to his tenant who pays rent for it. The terms of payment of that rent concern the liferenter and his tenant only: the fiar has no right to any crop while the liferent subsists; nor consequently to the rent payable for such crop. Hence, in separating the interest of the liferenter from that of the fiar, the determining circumstance is, for what crop any particular term's rent is payable: if the crop come under the liferenter's right, the rent due for it belongs to him,
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or to his executor, whatever be the term of payment. I descend to particulars. Where the rent of a corn-farm is payable in kind, the liferenter must survive Martinmas, to give him right to the rent payable for the preceding crop; and if he decease before Martinmas, though after Whitsunday, he has no share of that year's rent. If the rent be payable in money at two terms, the liferenter surviving Whitsunday has right to the half-year's rent payable by the tenant for his possession from the Martinmas preceding. And if he survive Martinmas, he has also right to the rent for the tenant's possession from the Whitsunday preceding. The conventional terms of payment are not regarded, but for what crop the rent is payable. See l. 58. *De usufructu*.

It will appear even at first view, that the division of rent between heir and executor ought not to be governed by that rule. The liferenter and fiar have opposite interests, the property of the latter being confined by that of the former. The rent payable for any crop that falls under the liferenter's right, must, after his death, go to his representatives; for the fiar evidently has no right. But as to heir and executor, both of them are representatives of the deceased proprietor; and with respect to any crop that he survived, his property cannot be pleaded for the executor against the heir, more than for the heir against the executor. By what rule, then, is this division

sion to be determined? The heir succeeds to the land, and has right to whatever arises out of the land from the time of his predecessor's death. The executor, who has no interest in the land, has no claim to any rent but what fell due during the predecessor's life. Had that rent been paid to the predecessor, as it ought to have been, it would have augmented the moveable estate; and it is a rule in equity, That what ought to have been done, bestows the same right as if it had been done: it will not be left in the power of a tenant, to prefer the executor, or the heir, by punctual or dilatory payment. The rule then is, That no rents belong to the executor but what were in arrear during the predecessor's life. Between liferenter and heir the legal terms are the rule: but the conventional terms, between heir and executor.

The latter part of this rule shall be illustrated, by applying it to a particular case. A tenant entering at Whitsunday 1758, agrees to pay a year's rent per advance, being for the corn-crop 1759. The landlord dies a few days after Whitsunday, and the question is, Whether the year's rent payable at that term, goes to the heir or executor? The heir has the plea of property, as the property was his during the growth of crop 1759. But the plea of property does not rule between the heir and executor. The rent in question was an arrear at the landlord's death: had it been paid,

paid, it would have gone to the executor; and what ought to have been done, is held in equity as done. Were the plea of property to have any effect here, it would have a more extensive effect than any lawyer will admit. It would make the executor accountable to the heir for the rent under consideration, supposing it even to have been received by the predecessor: it is the rent of crop 1759, and that crop falls under the heir's property, &c. Take an opposite case. The tenant enters to a corn-farm at Whitsunday 1758; and for the crop 1759 pays the rent at Candlemas and Lammas 1760. The landlord survives Martinmas 1759, but dies before Candlemas 1760. He died, it is true, proprietor of the crop 1759; but that circumstance benefits not the executor, who has no claim but to arrears. And therefore the whole rent payable for crop 1759 belongs to the heir.

With respect to the division of rent between the fiar and representatives of a liferenter who is a localist, the rule above laid down is adopted in our practice. Far otherwise between the heir and executor; for the rule that justly obtains between the former, is erroneously applied between the latter. If the predecessor survive Whitsunday, his executor, by our present practice, has right to the half of the rent payable for the crop of that year; and to the whole, if the predecessor survive Martinmas. This is to be regretted;

gretted ; because, instead of a rule agreeable to principles, and easy in the application, one is substituted, not only erroneous, but intricate.

What it is that has betrayed our lawyers into this error, may deserve inquiry. One thing we know, that formerly the rent was payable at Whitfunday and Martinmas, each for the possession of the half-year preceding. While this continued to be the custom, the executors drew the Whitfunday rent when the predecessor survived that term, and the whole year's rent when the predecessor survived Martinmas. And thus, as the conventional and legal terms coincided, it was the same to hold that the conventional terms were the rule, or to hold that Whitfunday and Martinmas were the rule. But mark the consequence. Had the proposition been expressed in the former manner, the conventional terms would have continued to be the rule, as they ought to be. But the latter expression happening to be adopted, Whitfunday and Martinmas unwarily continued to be the rule, after ceasing to be the conventional terms. And what mainly contributed to the illusion, was the case of life-renter and fiar, where Whitfunday and Martinmas are the just rule, without regard to the conventional terms. Thus, in contradistinction to the conventional terms, Whitfunday and Martinmas are called *legal terms*, because they are made the rule

for dividing rents between heir and executor, as well as between fiar and liferenter.

To intitle the executor to rents that were not due at the death of the predecessor, admits scarcely of an excuse, when it is considered, that a lease of land is a proper example of a right having *tractum futuri temporis*, which invariably descends to the heir; except with regard to such portions as became due during the predecessor's life.

But to whatever objections the rule may lie open, as regarding heir and executor, it is however adopted in practice, and must be submitted to. I therefore proceed to illustrate it by examples. In a corn-farm, the tenant enters at Martinmas 1758; or at the separation of the crop from the ground. The first half of the year's rent is made payable at Martinmas 1759, and the other half at Whitsunday 1760, being both for crop 1759. If the proprietor survive Whitsunday 1759, the rent payable at Martinmas 1759 will make part of his moveable estate; and if he survive Martinmas 1759, the rent payable at Whitsunday 1760 will also make part. And though payment of the rent be postponed to Candlemas and Lammas 1760, or to any later terms, the division is the same as if made payable at Martinmas 1759 and Whitsunday 1760; or even made payable at Whitsunday and Martinmas 1759: for whatever the conventional terms

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be, the rents are payable for crop 1759. Suppose again a tenant, who enters to a corn-farm at Martinmas 1758, is taken bound by the lease to pay the first half of his year's rent at Candlemas 1759, and the other half at the following Whitsunday. These rents being payable beforehand for crop 1759, it follows from the common rule, that if the landlord die before Whitsunday, his executor will draw none of the rent for that crop; not even the half payable at Candlemas 1759, supposing it to be outstanding. Here the common practice contradicts most directly the rule of equity above mentioned, That what ought to be done, is held as done. If the landlord survive Candlemas, which is here supposed, the rent payable at that term ought to be considered as received by him, and as making part of his moveable estate. Let it be next supposed in the case figured, that the landlord dies between Whitsunday and Martinmas 1759, his executor, by the rule in practice, would have no right to the rent payable at Whitsunday, though due before the landlord's death, which is equally absurd.

Where the tenant enters at Martinmas, the division of rent between heir and executor will be the same, whether it be a corn-farm or a grass-farm. The first half of the year's rent, at whatever time payable, is due for the tenant's possession from his entry to the next Whitsunday; and consequently

consequently it will belong to the executor, if the landlord survive that term, both in a corn-farm and grafs-farm. But the result will be different where the tenant's entry is at Whitfunday; which now prevails in corn-farms in order that the new tenant may prepare for a crop of oats, by folding his cattle, and for a crop of wheat, by a summer-fallow. A tenant then enters to a corn-farm at Whitfunday 1758, and is bound by his lease to pay his rent at Candlemas and Lammas 1760. The rent being for the crop 1759, belongs wholly to the heir, if the predecessor die before Whitfunday 1759; divides between the heir and executor, if the predecessor die between Whitfunday and Martinmas 1759; and belongs wholly to the executor, if the predecessor die after Martinmas 1759. But supposing the same entry in a grafs-farm, and the same terms of payment; the rent will be understood as payable for the year's possession from Whitfunday 1758 to Whitfunday 1759; consequently, if the landlord survive Martinmas 1758, his executor will have the half-year's rent payable at Candlemas 1760; and also the other half payable Lammas 1760, if the landlord survive Whitfunday 1759.

In one case I find it determined, that as the whole product of a grafs-farm, in cheese, wool, lamb, &c. arises during summer, the year's rent must be understood as due for the possession from Whitfunday to Martinmas; and therefore the te-

nant's entry being at Whitsunday, and the rent payable at Martinmas and Whitsunday following, that the whole must belong to the executor where the landlord survived Martinmas *. The fixing Whitsunday to the 15th day of May old style, was probably the occasion of this judgment; for it makes the summer's possession much more profitable than that of the winter. But as this innovation was certainly not intended to make any alteration in the division of rent between heir and executor, the common rule was adhered to in a similar case, lately under consideration; which is as follows. In a grass-farm, the tenant, whose entry was at Whitsunday, became bound to pay the first half of his rent at Martinmas after his entry, "for the half-year immediately preceding," as expressed in the lease, and the remainder at the next Whitsunday, "in full of the first year's rent." The landlord died in February, and the last half of the year's rent payable at the ensuing Whitsunday, was decreed to belong to the heir †. For here, both from the nature of the subject set in lease, and from the express words of the lease, the last half of the rent made payable at Whitsunday, was from the preceding possession from Martinmas to Whitsunday; and therefore the

* February 1727, Sir William Johnston *contra* Marquis of Annandale.

† 14th December 1759, Turnbull *contra* Ker of Houselaw.

landlord

landlord having died before Whitsunday, his executor was not intitled to the rent payable at that term. This interlocutor however was not adhered to; it was altered, 2d July 1760, by the narrowest plurality, in favour of the executor. The judges who voted for the alteration, influenced by the case first mentioned, were of opinion, that the whole year's rent was for the summer's possession, and that the winter's possession goes for nothing; an opinion repugnant to the terms of the lease, as well as to the nature of the subject leased.

ART.

A R T. X.

Hypothec for payment of rent.

A Man by granting a lease of land, does not give away the property; and therefore the whole corn, while growing upon the farm, is the landlord's property, *quia satum cedit solo* *. And consequently, where rent is paid in kind, he can force payment by a *rei vindicatio* against every one who meddles with the crop, not excepting a purchaser for a valuable consideration. The tenant, it is true, has by paction right to what remains of the crop, after making good the landlord's rent; but till that be done, he has not right to a single sheaf. This *rei vindicatio*, founded evidently on the landlord being proprietor of the corn, is erroneously considered as a hypothec upon the effects of his tenant.

The crop being the landlord's property, and continuing to be his property till he draw his rent out of it, it is evident, that he is not intitled to draw the rent of one crop out of any other crop. To obtain preference for the rent of any crop upon any subsequent crop, the landlord must do diligence; and he will not be preferred

* See Historical Law-tracts, tract 4.

before any other creditor, but according to his diligence.

Plenty of money has introduced money-rent ; which implies a transference of the crop from the landlord to his tenant. A landlord whose rent is payable in money, has no claim to any part of the product : on the contrary, the product must be at the disposal of the tenant, in order to raise money for paying the rent. And therefore, the security which the landlord has for his money-rent, cannot be other than a hypothec in a proper sense. If it be demanded, upon what authority is this hypothec founded, I answer, upon consuetude. And it is not difficult to explain what gave a beginning to the consuetude. Our forefathers, far from being sharp-sighted in law-distinctions, did not advert to the consequences of converting corn-rent into money. A real action, at the instance of the landlord against a purchaser of the crop, was familiar in the case of corn-rent ; and the same action was blindly sustained for supporting the claim of money-rent, though the crop was no longer the landlord's property. It is far however from my intention to condemn this hypothec, though introduced by a blunder. It is expedient and proper, that security should be provided to the landlord upon the product of his own land, for making his money-rent effectual.

While rents were payable in kind, there could
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be no occasion for hypothecating the cattle of a corn-farm. But when money came to be stipulated for rent instead of corn, it was natural to secure the payment by a hypothec on the cattle as well as on the corn.

Cattle pasturing on a farm are not more connected with the rent of one year, than with that of another; and for that reason they remain successively hypothecated for the rent of every year. But though the hypothec on corn, with respect to money-rent, be precisely of the same nature with that on cattle, yet it is sustained for the rent only of that precise year of which it is the product. It was so originally when rent was payable in kind; and our forefathers have inadvertently apply'd the same rule to the hypothec of corn for money-rent, though in its nature very different. After the rent for crop 1759 becomes due, there happen to be in the yard some corns of the preceding crop: the landlord cannot claim these as hypothecated for the rent 1759. This rule proves extremely inconvenient both in fore-hand rent, and in rent payable long after separation of the crop from the ground. In the former, it is of little or no use to the landlord; and in the latter, it is oppressive to the tenant, and sometimes highly oppressive. The first example I shall give is, where the tenant entering at Martinmas 1758, pays at his entry a year's rent for his expected possession of crop 1759. Every year's

year's rent being thus payable a complete year beforehand, the landlord cannot use his hypothec for a year after his rent becomes due. This however is but a trifling inconvenience, compared with what the tenant suffers where the terms of payment are late. The example I shall give is common. A tenant enters to a corn-farm at Whitsunday 1758; and for the crop 1759 he pays the rent at Candlemas and Lammas 1760. If the crop 1759 be hypothecated for that rent only, it follows, that at Candlemas 1760, the tenant must have as much of the crop on hand as to satisfy a year's rent; and as much even at Lammas as to satisfy half a year's rent. A hardship more intolerable cannot well be figured: it is by the sale of corn that the tenant procures money for paying his rent; and yet the hypothec so interpreted, instead of promoting payment, is the very thing that retards it. Consider the thing in a different view. Late terms of payment are intended to favour the tenant, that he may have full time to procure money for paying his rent; and yet, according to the effect given to the hypothec, he gets not a moment's delay; or, which comes to the same, he has no benefit by the delay.

I would not however be understood to plead for a hypothec on corn, equally permanent with that on cattle. After the year's rent becomes due, the landlord has three months for making

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the hypothec upon the cattle effectual * ; and after that year's rent is satisfied, the hypothec upon the cattle commences for the next year's rent. Nor is there any inconvenience in these successive hypothecs ; because the same horses, horned cattle, and even sheep, continue upon the land for years. A corn-crop is in a very different condition. It suffers by keeping ; and, reserving what is sufficient for maintaining the family, the only use of the remainder is to convert it into money for paying the rent. And yet, to hypothecate the same corn successively for the rent of different years, would be pernicious equally to the landlord and to his tenant, by preventing the latter from paying any rent. Nor is a security so heteroclete necessary in any degree. Crops of corn are renewed every year ; and with respect to any single crop, it is sufficient that it be hypothecated for the rent of a single year ; a new crop will succeed, to be a security for the next year's rent. And if corn is to be hypothecated for a single year's rent only, it ought to be the half-year's rent that is current when the corns are reaped, and the half-year's rent immediately preceding. By that plan, the hypothec is as little oppressive as possible to the tenant ; and no less beneficial to the landlord, than if any other year's rent were secured by it.

* January 1726, Hepburn *contra* Richardson.

The hypothec under consideration, whether affecting corn or cattle, is, in its nature, so singular, as to create a doubt, whether such a legal conception of it can be formed, as to account for all its avowed consequences. It is admitted, that a hypothec upon the cattle, bars not the tenant from aliening any particular horse, ox, or sheep, or even quantities of them; provided sufficiency be left for the hypothec. It follows clearly, that no individual is hypothecated; and yet, upon that supposition, it is difficult to conceive that the whole flock or herd can be hypothecated. To avoid that difficulty, one is led to think, that there is no hypothec here in a proper sense; but only a preference given to the landlord before the tenant's other creditors, not as having any real right, but upon equitable considerations; a preference *inter chirographarios*, as termed in the Roman law. But in avoiding *Scylla*, we are driven upon *Charibdis*. If the hypothec be reduced to a preference *inter chirographarios*, it cannot affect *bona fide* purchasers for a valuable consideration; which however it does by established practice. In short, this hypothec seems not easily reducible to just principles.

A R T. XI.

Dominium directum et utile.

THE superior's right to the land is, in its nature, unlimited, extending over the whole. The vassal's right, on the contrary, is in its nature limited, being in effect a burden on the superiority. Accordingly, when the vassal's right is by any means annihilated, the superior's property, like air formerly compressed, expands itself over the whole, and becomes unlimited, precisely as before the vassal's right existed. The vassal's right, on the contrary, being originally limited, would not turn more extensive by extinction of the superior's property, if such a thing could be.

From this definition, the following consequences are derived. First, A resignation *ad remanentiam*, or even a simple renunciation, is sufficient to extinguish the vassal's right, and to render the superiority unlimited as originally; because a simple renunciation is sufficient to extinguish a real burden, though not to convey it. But a renunciation by the superior in favour of the vassal, avails nothing: because property cannot be extinguished like a real burden; nor can one
divest

divest himself of his property, otherwise than by conveying it to another.

Second, A discharge to the vassal of the future casualties of superiority, though good against the granter, has no effect against a purchaser of the superiority. The reason is, that these casualties, being inherent in the superiority, cannot be separated from it. They are in reality so many effects of the original property reserved to the superior; feu-duties, for example, liferent-escheat, ward, nonentry.

This affords a satisfactory reason, why casualties of superiority are not lost by negative prescription. Being inherent in the property, they must subsist with it. And as property is not lost by negative prescription, neither can these casualties be lost, except as to arrears.

ART.

A R T. XII.

Clause of Return.

THE nature and import of a clause of return, seem not to be clearly apprehended.

During the vigour of the Feudal law, every grant of land was limited to the vassal, and to the heirs named in the grant. When these were exhausted, the land returned to the superior.

The feudal system was undermined by degrees, and land was restored to commerce. The forms however of that system continued in practice, because no other forms were known for conveying the property of land. And hence a blanch holding, which has no relation to the feudal system, but form merely. The purchaser, though nominally a vassal, is absolute proprietor; and in that quality transmits the land to his heirs of line, failing the heirs named in the grant. And even where the nominal vassal leaves no heirs, the subject returns not to the superior, but belongs to the King, as *ultimus hæres*.

As this alteration in the feudal system was not instantaneous, there must have been a period, when some lands were governed by the Feudal law, and others by common law, excepting
always

always the form of the title-deeds. The former were distinguished by the name of *feuda vetera*, the latter by that of *feuda nova*.

During that period, where a proper feudal grant was intended, confining the grant to the heirs named in the investiture, a proper clause to that effect became necessary; otherwise it must have been uncertain whether a *feudum vetus* or *novum* was intended. The clause was termed a *Clause of Return*, bearing, that when the heirs of the investiture were exhausted, the land should return to the superior. And hence it came to be understood, that a grant without that clause was intended to be a *feudum novum*.

This clause is imitated in deeds that have no relation to the feudal holding; signifying the granter's intention, that the succession shall not be altered to his prejudice, but that the subject shall return to him when the heirs named are exhausted. Our judges accordingly give that sense to the clause, in the following case. A bond for borrowed money was taken by the lender to herself in liferent, and to her son in fee, with the following provision, "That if her son die without heirs of his body, the sum shall return to her, and her heirs." This clause was found to imply, that the son could not alien gratuitously; Falconer, 10th February 1685, College of Edinburgh *contra* Mortimer.

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In the decisions of the court of session, different effects are given to these clauses of return contained in bonds. Sometimes, they are held equivalent to a clause of return in a feudal holding, barring both extraneous heirs and gratuitous assignees. Sometimes, they are held to be no better than a simple destination of succession. As questions of will are influenced frequently even by minute circumstances, it is not surprising to find little uniformity in the decisions of the court with relation to clauses of return. The nearest approach to uniformity that occurs, is to distinguish a clause of return that a man provides in his own favour, from a clause of return in favour of another. It is rational to give the most liberal interpretation to the former, and the most limited interpretation to the latter. A clause accordingly of the former sort, will bar both extraneous heirs, and gratuitous assignees. A clause of the latter sort will be constructed a simple destination of succession.

I proceed to examples. In the case above quoted, College of Edinburgh *contra* Mortimer, the borrower was indeed the granter of the bond; but the destination of succession and clause of return were the operation of the creditor, with which the debtor had no concern. And as the clause of return was in favour of the creditor, the court gave it the most liberal meaning. The following cases are of the same nature. Part

of the family-estate of Douglas being granted "to
 " the heir of a second marriage, and the heirs
 " of his body; which failing, to return to the
 " right heir of the family of Douglas," it was
 judged, That this estate could not be gratuitously
 aliened in prejudice of the family of Douglas *.
 A man granted bonds of provision "to his two
 " daughters, and to the heirs of their bodies;
 " whom failing, to return to the granter." The
 clause of return here was sustained as a prohibi-
 tion to alien gratuitously †. In a bond of provi-
 sion, there being a clause, that if the obligee
 died unmarried, the sum should return to the
 granter; and she having died unmarried after as-
 signing the bond gratuitously, the assignment was
 reduced ‡. But in a settlement of a family-estate
 to a long train of heirs, a clause of return, fail-
 ing these heirs, to the granter, and his other
 heirs, is understood to have no other meaning, but
 the adding one link more to the chain of heirs;
 and therefore will not bar a gratuitous alienation:
 witness the following case. A man settled his e-
 state on his son and heir, and the heirs-male of
 his body; whom failing, to return to himself.

* 18th February 1717, Duke of Douglas *contra* Lock-
 hart of Lee.

† Stair, Fountainhall, 31st January 1679, Drummond
contra Drummond.

‡ Home, December 1683, Scot *contra* Scot.

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This was constructed to be a simple destination, alterable by any of the substitutes *.

Next, as to a clause of return in favour of a third party. This is held to be only a simple destination, alterable at pleasure. Thus, in a bond of borrowed money, it being provided, "That if the creditor died without heirs of his body, the sum should return to the debtor," it was found, that the creditor might dispose of the money without restraint †. A man having granted bond to his sister for a valuable consideration, with the following provision, "That if she died unmarried, the sum should return to the grant-er," and she having died unmarried, after assigning the bond gratuitously, the debtor was decreed to pay the sum to the assignee ‡.

* Home, 26th January 1726, Marquis of Clydesdale *contra* Earl of Dundonald.

† Stair, Fountainhall, 18th November 1680, Murray *contra* Murray.

‡ Home, February 1683, Lowrie *contra* Borthwick.

A R T. XIII.

Parsonage and vicarage teind.

WHere these belong to the same titular, the valuation is the fifth part of the rent; and where a silver-duty is paid for vicarage, the whole fifth is reckoned parsonage, deducting only the silver-duty. But where the titularities are different, the parsonage-teind is but the fifth of the rent payable for the corn-crop. These rules seem not consistent with each other. However the vicarage be computed, the value of the parsonage-teind can never justly exceed the fifth of the rent payable for the corn-crop. Nor is this the only puzzling circumstance. Suppose both parsonage and vicarage teind to belong to the same titular; his aliening the vicarage-teind, cannot alter the value of the parsonage-teind; and yet the heritor gains by this alienation; for now he is allowed to value his parsonage-teind at no more than a fifth of the rent payable for the corn-crop. Suppose next, the titularities being originally different, the titular of the parsonage-teind acquires right to the vicarage. Why should this oblige the heritor to purchase the parsonage-teind at a higher rate than when the titularities were different? The fifth of the rent payable for the corn-crop, ought in every case to be held the value of the parsonage-teind.

A R T. XIV.

Active and passive representation of the heir.

IT is agreeable to the principles of justice, that a man's effects, after his death, should go to his children : who, on the other hand, ought to pay his debts to the extent of the effects. And yet, by adopting a fiction of the Roman law, That the heir is *eadem persona cum defuncto*, we have unwarily deviated far from justice, particularly in subjecting the heir universally to the predecessor's debts, without the least regard to the extent of the succession ; which continues to be our law to this day, unless the heir enter *cum beneficio inventarii*. This subject is discussed at large in Historical Law-Tracts, tract 13.

Laying regard to justice aside, identity of person may have a colour in subjects of property, and in obligations that can be performed by one person or another indifferently. But as the heir is in reality a different person from his predecessor, there are certain things purely personal that he cannot succeed to, and other things equally personal that he cannot be liable to perform. An attempt to regulate such matters by personal identity, would not only be unjust, but absurd.

These

These I propose to handle in the present Article. I begin with the first; which is, to examine how far the active representation of an heir extends.

Grotius lays down the following rule, “Heres
“ *personam defuncti refert, non in meritis quæ*
“ *sunt mere personalia, sed in bonis *.*” This
rule is obscure; but it may be cleared as follows.
Every thing that can be transferred from one to
another, is said to be *in bonis*; and to such the
heir succeeds. But there are certain things which
cannot be transferred from one to another, and
are extinguished with the person who has them:
these are purely personal, and are not capable of
succession. A man’s knowledge, his strength,
and his qualities in general, are buried in the
grave with him. Reparation is due to the man
only who is injured: not to his heir. And even
where money is the only reparation that can be
made, termed *assythment*, the claim, being due
in solatium to the person injured, descends not
to the heir; unless a decree have been obtained for
it by the man himself; for by that decree, it is con-
verted into a proper debt. But where the prede-
cessor is intitled to damages against a person who
has burnt his house, or killed his horse, the claim
being founded on property, descends to the heir,
as the subject would have done had it not been
destroyed. And where his predecessor has been

* De jure belli et pacis, lib. 2. cap. 29. § 19.

wounded,

wounded, he is intitled to sue for the expence laid out on the cure; because so far the subject to which he succeeds is diminished.

A title of honour cannot be classed under *bona* or effects; and yet, it is not an objection to the foregoing doctrine, that the heir succeeds to the peerage of his predecessor. A peerage is a right purely personal, and dies with the person who bears it. The heir assumes it in his own right, being intitled by the patent, not as representing his predecessor. It is accordingly established, that the bearing a title of honour belonging to a family, is not a passive title subjecting the heir to the debts of his predecessor *.

All subjects, moveable and immoveable, descend to representatives. In no civilized country are subjects left *in medio* without an owner; and the heir is the person who naturally succeeds to what is left by his predecessor. But there are certain powers and faculties respecting subjects of inheritance, some of which descend to the heir, some not; and it seems not an easy task to bring these under any general rule. Some faculties are created by law upon considerations purely personal. For the peace of families, and to prevent a married couple from robbing one another by undue influence, the law has bestowed both on husband and wife, a power of revoking donations

* Harcarfe (Airs), 2d February 1682, Bowar *contra* Earl Marischal.

made by the one to the other. But as the motive here is purely personal, the power of revocation descends not to the heir. The act 1669, requiring consignation in case of suspending a minister's stipend, is a privilege personal to the minister; nor is there any reason for extending it to his executors.

With respect to faculties created by will, though heirs are excluded at common law if not provided for in the deed, yet in equity the heir succeeds where justice or utility interposes in his behalf. A power of demanding back land aliened, termed *a reversion*, will not descend to heirs, if not named in the deed; for a perpetual reversion is a burden upon property too severe to be presumed, where heirs are not mentioned. But suppose, that a disponent stipulates to himself a reversion during a limited time, ten years for example, and dies during that period; will his heir be privileged to redeem within the ten years? At common law he is not privileged. But equity suggests the following distinction: Where the disposition is gratuitous, it will be presumed the will of parties, that the land may be redeemed at any time within ten years by the disponent, and failing him, by his heir: but there is not the same presumption where the land is disposed for a full price.

Whether obligations created by will go to representatives where not named in the deed, must
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be ruled by equity. An obligation for a valuable consideration, goes to representatives, unless they be expressly excluded: a gratuitous obligation goes not to representatives, unless they be expressly included *.

Next as to passive representation. There are obligations, purely personal, that the heir is not bound to fulfil, as there are rights, purely personal, that descend not to him. No obligation that requires art or talents to fulfil, burdens the heir. My predecessor became bound to draw a picture for a man, to build a house for him, or to serve him as a soldier: I am not bound.

Punishment is purely personal; for to inflict it upon any but the guilty, would not answer its end. Therefore if my predecessor have committed a crime, I am not bound to submit to the punishment. An heir is not liable even for a pecuniary penalty; unless it have been converted by a decree into an ordinary debt. The penal passive title accordingly of vicious intromission, is not extended against heirs beyond the value of the subjects unlawfully taken away †. In the Roman law, litiscontestation with the predecessor, subjects the heir to every penal action. The reason is, that litiscontestation was originally a con-

* Principles of Equity, book 3. ch. 3.

† Dirleton, 14th July 1666, Cranston *contra* Wilkison; Dirleton, 14th December 1676, Wallace *contra* Murray.

tract, in which the litigants bound their heirs, as well as themselves *; and the heir was bound by his predecessor's contract, not for his delict. This rule was preserved alive among the Romans, by force of custom, after jurisdiction was established upon authority of law, and litiscontestation ceased to be a contract; which is one example among many, of effects being supported in practice, after their causes are gone. But however excusable an error may be that is sanctified by long custom, our lawyers cannot be excused for adopting the foregoing rule from the Roman law; seeing that litiscontestation never was held with us to be a contract †. And if the heir be bound to sustain a penal action litiscontested with his predecessor, he is made liable for his predecessor's delict; which cannot be justified, as punishment is strictly personal. Strange! that this should have been overlooked by our writers on law; who, all of them, without a single exception, adhere to the Roman rule. And no less strange, that it should be overlooked by our judges, who currently subject the heir to every penal action that has been litiscontested with the predecessor. Thus, an extracted act of litiscontestation, and a proof of vicious intromission taken against the intromitter himself, were found sufficient to make his representatives liable

* Historical Law-tracts, tract 9.

† See the same tract.

in solidum *; though to subject them beyond the value of the subject intermeddled with, was obviously to punish them for their predecessor's delict. It deserves, at the same time, to be observed, how prone men are to revolt against established rules that are not founded on just principles. Our judges are always disposed to lay hold of any pretext, for evading the injustice of the rule under consideration. Thus, a process on the passive title of vicious intromission being insisted on against the intromitter, who deceased after an act of litiscontestation was pronounced by the Ordinary, the court refused to transfer the same against his heir; partly because the act was not extracted, and partly because, after the interlocutor, the pursuer was obliged to amend his libel, by changing one Christian name for another †.

A rule is laid down above, concerning what obligations go to heirs, when they are not mentioned in the deed. What obligations go against heirs, is a question to which the same rule is applicable. A gratuitous obligation will not subject the heir, unless he be subjected in the deed. Thus, a bond of pension granted to an advocate, was judged to die with the granter, seeing no

* Dalrymple, 5th June 1717, Forbes of Thornton *contra* Forbes of Tolquhoun.

† Forbes, 7.; Fountainhall, 8th February 1712, Stewart *contra* Earl of Bute.

mention was made of his heirs *. The contrary holds in obligations for a valuable consideration: the heir is liable, unless it be declared that he shall not be liable. Thus, a bond for borrowed money burdens the heir, though he be not mentioned in the bond. It is presumed, that he was omitted by oversight; and equity supplies the omission.

* Fountainhall, 25th January 1693, Mackenzie *contra* Marquis of Montrose.

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ART.

A R T. XV.

Special and general service.

TO transfer property *inter vivos*, delivery is necessary as well as consent. But to transfer it from the dead to the living, delivery is not necessary: nor can it be; for after the proprietor's death, there exists no person who can make delivery. Will alone is sufficient; and were it not sufficient, property could not be transferred from the dead to the living. Thus, the effects of the predecessor are, upon his death, transferred *ipso facto* to his heir; which is signified in the law of France and of England by the expression, *Mortuus fasit vivum*.

But this rule cannot hold where the heir is subjected to debts or burdens; for it would be inconsistent with justice, that a man, free and independent by nature, should be subjected to any obligation, or to any burden, without his own consent. In the Roman law, where the heir is held to be *eadem persona cum defuncto* in burdens as well as benefits, the heritage was not transferred to him *sola superviventia*, but needed an antecedent consent. The consent indeed required no solemnity: the apprehending possession of the predecessor's effects, termed *gestio pro herede*,

was

was held a sufficient declaration of consent. In France and in England there are no remaining traces of the Feudal law. The heir, by taking possession, does not subject himself personally to the debts or deeds of his predecessor: no more is incumbent on him, but to abandon his predecessor's estate to the creditors; and therefore, in the countries mentioned, *Mortuus fasit vivum* is the rule even in land-property.

In Scotland, this rule obtains not in the succession even of moveables. As every species of succession with us subjects the heir to his ancestor's debts, *aditio hereditatis* is requisite, as among the Romans, to testify the heir's consent to be liable. But the rule obtains here in every case where property is transferred without any debt or burden. Thus, the legacy of a *corpus* transfers the property to the legatee, the moment of the testator's death *.

There are two substantial reasons, that prevent the rule from taking place with us in feudal property. The first coincides with that above mentioned: an heir who succeeds to a land-estate is liable to his superior in certain duties, and is, over and above, liable for the debts of his predecessor; neither of which burdens can be justly imposed on him without his consent. The other reason is, that supposing the heir willing to

* l. 80. De legat. 2.; l. 64. De furtis; Stair, b. 3. tit. 4.
§ 24. b. 3. tit. 8. § 38.

undergo

undergo every burden, yet such is the nature of feudal property in Scotland, as not to be transferable from the dead to the living, more than *inter vivos*, without delivery: a seisin is equally necessary in both. In England the rule *Mortuus fasit vivum* obtains in the succession of land as well as of moveables; because both pass from the dead to the living without delivery. Hence it was an easy step in that kingdom to authorise the conveyance of land by testament, as moveables always had done. But as to land in Scotland a testament can avail nothing; because it neither expresses nor implies an obligation on the heir to make the defunct's will effectual: nor is it any ground for an adjudication in implement. Instead of a testament, a disposition is necessary, with procuratory or precept; or at least an obligation to grant a disposition, which may be made effectual by an adjudication in implement. Were a testamentary deed held sufficient in this country to transfer land, it would be necessary to new-mould our records, by rendering such deeds of no effect unless recorded.

These particulars premised, we proceed to the nature and use of the special and general services, beginning with the former. It is observed above, that the heir in a feudal holding, acquires the property by a grant from the superior, termed *renovatio feudi*. The sovereign here acts differently

differently from a subject-superior. The latter is supposed to be acquainted with the condition of his vassals : and upon application of the heir, he issues a precept for infesting the heir, or, in other words, for entering him into possession. No proof is necessary to verify the heir's claim, because the facts are known to the superior ; and the precept accordingly is introduced with the following preamble, *Quia mihi clare constat*. In order to receive a renovation of the feu from the sovereign, greater ceremony is necessary. The King is not supposed to be acquainted with every one of his numerous vassals ; and therefore it is made a general rule, That the person who claims as heir, must verify the facts that are necessary to support his claim ; which is done in the following manner. A brieve is issued from the chancery to the sheriff of the shire where the land lies, requiring him to try, by an inquest, the facts specified in the brieve. If the facts be verified, the sheriff of old gave infestment to the claimant ; and the verdict of the inquest remained in the sheriff's court, or was neglected as no longer of use. This form was altered by James I. in conformity to the practice of England. The brieve, with a minute of the court's proceedings and verdict of the inquest, are returned to the chancery ; and the claim being thus legally supported, a precept issues out of chancery to the sheriff, ordering him to infest the claimant. The
verdict

verdict of the inquest is termed a *service*, which, in England, expresses what is done in obedience to a writ. And with us afterward it was called a *special service*, in opposition to a general service when that writ was introduced. The process in the sheriff's court, after the practice was introduced of returning it to the chancery, obtained from that circumstance the name of *retornatus*, or *retour*.

One can be at no loss, after this deduction, to comprehend the meaning and purpose of a special service. The inquest are the witnesses called to give evidence of the necessary facts; the verdict is the evidence they give; and the whole proceedings are returned to the chancery, as an answer to the questions of fact put in behalf of the crown.

To explain a general service, a wider compass is requisite. In Scotland of old, the heir was not liable personally for the debts of his ancestor; nor is he even at present liable in England. Therefore, as to rent-charges, bonds including executors, and other heritable subjects, that may be termed allodial because not held of a superior, these in Scotland, as in England, were *ipso facto* transferred to the heir of blood, upon the death of his ancestor. Heirs with us were put on a different footing, by adopting identity of person from the Roman law. The heir, being by that fiction subjected personally to the
debts

debts of his ancestor, must consequently have an option to claim the succession, or to abandon it, as it suits his interest. And hence an *aditio hereditatis*, as among the Romans, without which the heir has no right to his ancestor's effects. If he use this form, he becomes *eadem persona cum defuncto* with respect to burdens as well as benefits: if he abstain from using it, he is understood to abandon the succession, and to have no concern either with burdens or benefits. The form is simple, adapted to the nature of the transaction. The laying hold of any allodial subject, is held an *aditio hereditatis*, or *gestio pro herede*; which, on the one hand, completes the heir's right to all subjects of the kind, and, on the other, makes him liable to all the debts of his ancestor. Thus, the taking possession of the heirship-moveables, makes the heir *eadem persona cum defuncto*; and the same possession is the only active title that is necessary. In that respect, the heir resembles the next of kin after the act 1690: a service is not requisite to complete the heir's right to heirship-moveables; and a confirmation is not requisite to complete the right of the next of kin to other moveables: neither of them has right *sola superviventia*; and the taking possession is the *aditio hereditatis* in both. A valuable manuscript of great antiquity, is bequeathed to a family; will it not be con-

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sidered as an heirship-moveable, to pass from the ancestor to the heir without a service?

There is a stronger analogy between heirship-moveables and heritable bonds or heritable dispositions, than is commonly thought. Considering an heritable bond as a *jus incorporale*, there is no analogy. But considering it as a manuscript, why may it not be transferred from the dead to the living, like any other heirship-moveable? A general service is not necessary to transmit heirship-moveables: an heritable bond, or other deed affecting land, considered as a *corpus*, is an heirship-moveable. For what purpose then was a general service introduced? Our authors are silent upon that head; and we must grope our way in the dark. The general service is of no great antiquity: it followed the special service at a great distance of time; and is an awkward imitation of it. Every circumstance proves, that it must have been introduced by ignorant practitioners, without authority of the legislature, and probably without direction of the sovereign court. In the first place, there is no brieve in the chancery for a general service. This defect could not regularly be supplied but by a statute. But precision was little minded; and it was thought, that the brieve for a special service might answer the purpose, though the whole clauses in that brieve concern land in which the predecessor died seised, and these only. In
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the next place, the verdict is no less irregular than the brieve: One question excepted, viz. Whether did the predecessor die at the faith and peace of our Sovereign Lord, the verdict answers none of the questions put in the brieve; but answers one that is not put, viz. Whether the claimant be the heir of line? A minute is made of the proceedings as is done in the special service; and is returned to the chancery, though the sovereign has no concern in the matter.

Considering that the general service is a servile imitation of the special service, we may conclude, with reasonable assurance, that to furnish legal evidence is the purpose of both. This is clear in a special service, from its form, and from its contents; and it is equally clear from the form and contents of a general service: the tenor of a writ is the strongest evidence of its purpose. But now supposing this, the question is, What is the use of the general service? An heir, in order to continue his predecessor's possession of the heirship-moveables, has no occasion for any proof. But heritable bonds are in a different condition. An heir may take possession of them *via facti*. But he cannot lay his hand upon the money *via facti*: he must apply to the debtors; who will be scrupulous about paying till they have complete evidence of his being heir. This consideration unfolds the purpose of the general service. If in every process against the debtors of the predecessor,

deceffor, it were incumbent on the purfuer to renew the evidence of his being heir, the expence would be grievous; and the general service was certainly invented to prevent that grievance. A general service accordingly may be confidered as a public proof, which every debtor is bound to regard.

I obferve an error gaining ground daily, as if it were the fpecial fervice that produces the identity of perfon between the heir and ancestor. A fpecial fervice has no fuch effect; it being, as demonstrated above, a fpecies merely of evidence. Subject-fuperiors, acquainted with the condition of their vaffals, have no occafion for evidence; and they accordingly give infeftment, by means of a precept of *Clare conftat*, without the folemnity of a fpecial fervice. Nor does there appear any thing in law to bar the King from granting fuch a precept, where the neceffary facts are known to him without a proof. It is probable, that he has often granted precepts of that kind to the heirs of his chief vaffals; of which there is one illuftrious inftance on record. James VI. granted a precept of *Clare conftat* in favour of his eldeft fon Prince Charles, as neareft heir to his mother Queen Anne in the lordfhip of Dunfermline, directing the fheriff of Fife to give feifin of the faid lordfhip to the faid Prince. To this precept the court of feflion interpoled their authority, 3d July 1619. Nor could they do otherwife;

therwise ; for it would have been ridiculous in the King, to require evidence of a fact, that he had better access to know than any other person. It is not therefore the special service that transfers the heritage to the heir ; nor is it the special service that subjects the heir to the debts of his ancestor. It is the infeftment that completes both the active and passive titles : it transfers the property of the estate to the heir ; and consequently makes him liable for the predecessor's debts. And indeed so little weight was laid upon the service after obtaining infeftment, that it was commonly left in the chancery neglected, without even taking an extract. But it was unnecessary to say more than to appeal to an established point, which is, That if the heir, after expeding a special service, stop short, and neither take infeftment, nor enter into possession, he will not be liable for his ancestor's debts, nor have right to his estate.

Neither is it the general service that completes the active and passive representation of the heir, with respect to heritable subjects that fall not under a special service. It is observed above, that in such subjects *mortuus facit vivum*, and that apprehending possession is the circumstance that completes both active and passive representation. So true this is, that if, after expeding a general service, the heir abstain from intermeddling, he will be liable for none of his predecessor's debts.

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That in practice the general service is considered as evidence only, will appear from the following considerations. First, A debtor in an heritable bond, if he be willing to wave a general service, pays safely to the heir; and though that heir die without a general service, the heir next in succession has no claim against the debtor; which shews, that the heir has right *sola supervivencia*; and that a general service is only necessary to ascertain that he is heir. That the court of session will have no difficulty to sustain such a payment, there is reason to believe from analogy: a debtor in a moveable bond, is not bound to pay to the next of kin without a confirmation; but if he pass from that formality, a discharge by the next of kin is always sustained as an extinction of the debt.

Second, It has been long an established maxim, That a special service includes a general service. Taking a service, general or special, as a title to the ancestor's effects, the maxim cannot hold. A special service, as observ'd above, is not a title to land, but only a means for obtaining from the Sovereign a precept for infefting the heir, which, with seisin upon it, completes his title. And even supposing a special service to be a title; it is confined to land in which the predecessor died infeft, and reaches not any other heritable subject. A special service then, if held to be a title, cannot include a general service. But
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holding a special service, as it truly is, to be evidence that the claimant is heir, the reason of the maxim is obvious. A verdict finding me to be heir of line, intitles me to demand from the sovereign a renovation of my ancestor's feu, provided to him and his heirs of line. After which, there is no necessity of a new proof, when I demand payment of an heritable bond that was due to my ancestor.

Third, Where in a bond secluding executors, or containing a clause for infesting the creditor, there is a nominatim substitute, a general service is not necessary. Why? because where the heir is named, there is no occasion for a proof. Were a general service necessary for transferring heritable subjects from the ancestor to his heir, it would be no less necessary to a nominatim substitute, than to any other substitute. And I must observe in passing, that this is one of the cases where the maxim holds in Scotland, *Mortuus fasit vivum*: a nominatim substitute is not subjected to the predecessor's debts beyond the value of the subject; and therefore the subject vests in him *sola superviventia*. An *aditio hereditatis* is unnecessary where the heir runs no hazard.

It has indeed been doubted, whether a nominatim substitute in a subject where the institute was infest, can take without a special service. But I can find no ground for the doubt; considering especially, that a general service is not requisite

site to a nominatim substitute in other heritable subjects. No analogy appears more intimate, than between a nominatim substitute in an infestment of annualrent, and a nominatim substitute in an heritable bond where infestment has not been taken : a proof is not necessary in the one case more than in the other. I venture, at the same time, to conjecture the occasion of the doubt. The practice in chancery, of requiring a special service before issuing a precept for infesting the heir, is so common, that in vain would even a nominatim substitute demand such a precept without a previous service. And it is prudent in the director of the chancery to adhere to established forms, without taking upon him to judge how far such forms are essential. But the practice of the chancery, whatever doubt it may occasion, affords certainly no argument for the necessity of a special service in this case. At the same time, there is one noted example, mentioned above, of a precept granted by the sovereign without a previous service. When King James, in favour of his son Prince Charles, issued a precept of *Clare constat* of his being nearest heir to his mother Queen Anne, it would have been ridiculous to have issued a brieve for inquiring into facts that could not be but well known to the King ; and it is no less ridiculous to demand any proof from a nominatim substitute, when his claim is legally vouched by an authentic writing.

I close this subject with a case that affords a fair opportunity of applying the principles above laid down. A purchaser of land having obtained a disposition with procuratory and precept, dies in possession, but without being infeft. What is necessary to be done by the heir for completing his right to the land? It will be answered, that a general service transfers to the heir the disposition granted to his ancestor; which intitles him to take infeftment, by using the procuratory or precept, as the ancestor himself might have done. But is this form necessary in all cases, or in the present case? About the heir I suppose there is no doubt. The heir, acknowledged by all to be so, continues his ancestor's possession of the land, as well as of the disposition, and of the heirship-moveables. He levies the rents. These particulars make a complete *gestio pro herede*, which transfers to him the property of the disposition, as well as of the heirship-moveables. What better right can a general service bestow on him? The disposition granted to his ancestor is a *corpus*, of which he is intitled to take possession; and by that possession, the property of the disposition is transferred to him, as well as of the heirship-moveables. What bars him then from using the procuratory or precept, as his predecessor might have done? He has no need of a general service, because he has no occasion to prove any fact.

But however evident this may be, it is thought,

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with respect to land held of the crown, that the Barons of Exchequer would not receive a resignation from the heir upon the ancestor's procuratory, without a general service. For here, as in a precept from the chancery, more weight will probably be laid upon practice than upon principle. Where the land is held of a subject, there is not the same difficulty. The heir of the disponent may use the procuratory of resignation granted to his predecessor; and the superior, by that resignation, is impowered to grant a charter, which, with feisin, will complete the heir's right to the land. But there is one way, by which the heir may obtain a charter from the crown without a general service. He takes investiture on the precept, and becomes vassal to the disponent. The Barons of Exchequer surely in that case would make no difficulty to receive a resignation from him, and to grant him a charter.

A R T.

A R T. XVI.

Executor.

AN executor is a trustee appointed by a testator for collecting in his moveable effects after his decease, and for converting them into money, to be distributed among the parties concerned. And where a man dies intestate, the executor is named by the commissary-court.

Where an executor receives a sum from a debtor of the deceased, the money must become his property, being delivered to him as a species, not as a *corpus*; and for this sum, he becomes debtor to those interested in the executry. But supposing an executor, after obtaining a decree against an executry-debtor, to have died without levying the money, will the decree fall under his own executry? Sir Thomas Hope * lays it down, that the decree descends not to his next of kin, but transmits to an executor *ad non executa*. Lord Stair, on the contrary †, says, “That a testament is executed when the debt is established in the person of the executor *activè*, and “of the debtor *passivè*, either by new security,

* Sect. 88. Minor Practics.

† Institutes, tit. Executry, sect. 61.

“ or by decret.” Sir George Mackenzie delivers the same opinion *, in the following words. “ If the executor have not execute the testament “ in his own lifetime, that is to say, have not “ obtained decreets for the goods belonging to “ the defunct, there will be place for a new executor for executing these, who is called executor *ad non executum*.” This in effect is holding, that a decree at the instance of an executor, though obtained by him in quality of executor or trustee, constitutes him creditor in place of the deceased, subjects him to the hazard of the debt *qua dominus*, and renders him and his representatives accountable for the sum, though the debtor become insolvent.

This point deserves more attention than seems to have been given it, by the authors last mentioned, or by any writer since their time. I begin with examining the case of an executor testamentary or dative, who have no interest but to collect and distribute the moveable effects of the deceased. To prevent embezzlement, the executor must, on oath, make an inventory of these effects, and find caution to make them forthcoming : upon which he is confirmed by the commissary ; and the confirmation is his title for intermeddling †. As it is the duty of this executor to make the most of the effects, he ought to dis-

* Institutions, book 3. tit. 9. sect. 16.

† Mackenzie, Instit. book 3. tit. 9. sect. 15.

pose of them by public auction, according to which he must account to the parties concerned; and for that reason, it is of no use to state any values in the inventory. This executor, being a trustee merely, ought to be subjected to no hazard. If a moveable happen to perish before sale by any accident, the persons interested in the executry-fund must suffer the loss: the executor cannot run the risk of effects that belong not to him. For the same reason, if a debtor of the deceased become insolvent after the executor has obtained a decree against him, the executor cannot be burdened with the debt, unless he have been negligent in demanding payment. Payment indeed made to him, extinguishes the debt, and renders him accountable for the sum he has received. It clearly follows, that a decree against a debtor by an executor testamentary or dative, is not a complete execution of the testament: the debt continues to be a part of the executry-fund; and upon the executor's death, an executor *ad non executum* must be appointed to levy the sum contained in the decree. In this case, therefore, the opinion of Sir Thomas Hope is undoubtedly well founded, and that of Stair and Mackenzie erroneous. So far Lord Stair is right, that the taking a new security instead of payment, and discharging the original debt, is a complete execution of the testament, subjecting the executor to account for the sum contained in the

the discharge. A bond of corroboration is different ; for it may be a prudent act of administration, to take such a bond when payment cannot be obtained.

I proceed to an executor-creditor. Confirmation is not to him a *cessio in jure* of the subjects confirmed : it affords him only a security upon these subjects, which intitles him to convert them into money for his payment. In a pointing there is a just appretiation of the goods ; and justice is not wounded, when the effects are adjudged to the creditor for his payment, at the appraised values. But as in a creditor's confirmation, there is no rule laid down for a just appretiation, nor for any appretiation, the law evidently intends, that the effects should be sold by auction ; and that the creditor should account for what he receives. According to this plan, the effects continue part of the executry-fund till they be sold. If a moveable be destroyed by accident, or a debtor become insolvent, the executry-fund is so far diminished : the creditor loses his security ; but his claim continues entire, to be the foundation of a new execution. Upon the same plan, it holds equally, that a decree obtained by an executor-creditor against a debtor of the deceased, is only an additional security. He is not bound to accept of this decree as payment, nor to run the risk of the debtor's solvency. It would be unjust to subject him to the risk, when he has

no choice, but must insist against the executry-debtors such as they are. Hence it follows, that if an executor-creditor, after obtaining a decree, die without levying the money, there must be place for an executor *ad non executa*. But in that case the representatives of the creditor ought to be preferred to the office, in order that they may recover payment of the debt confirmed, which is now secured to them.

An executor *qua* next in kin, leads to a speculation of more intricacy. Among the Romans, there was no distinction of effects with respect to succession from the dead to the living: the nearest male relation succeeded to the whole. In Britain the predecessor's estate is split into two: the person who succeeds to the heritable estate, is termed *heir*; and the next in kin, excepting the heir, succeed to the moveable estate. The right of the heir is established by a proper *aditio hereditatis*; and it is natural to think, that some form similar should establish the right of the next in kin. In practice, however, the authority the next in kin have to lay hold of the moveable estate, is derived from the commissary-court: they are named executors by that court; and they take possession of the moveables, as trustees, not as heirs. Why should they not be empowered to apprehend possession at short hand, as the heir is impowered with respect to heirship-moveables, or with respect to the rents of land? The myste-

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ry is explained in the Essays on British Antiquities *. The moveables of a person dying intestate were seized by the church, and disposed of by a trustee named by the church, termed *executor*; and nothing was more common than to apply the effects *ad pias causas*, as pretended; abandoning even the wife and children to poverty. The next in kin, it is true, were, in process of time, restored to their legal rights: but the form of their being named executors by the ecclesiastical court was continued; as there is nothing more common than to preserve in practice, modes and customs, after the introductory cause is at an end. At the same time, the nature of their right tended to preserve in vigour the form of naming them executors. As the fiction of the heir being the same person with his ancestor, was never introduced into the moveable succession; the next in kin is not liable even for moveable debts farther than *in valorem*. And to prevent a tedious count and reckoning, about the extent of the moveable succession, and of the value, custom has established an inventory, in which every particular subject is entered, similar to what is required in the confirmation of other executors; and according to that inventory, the next in kin account with the creditors and legatees of the deceased. But though the ancient form remains, substance is more regarded than form. Notwith-

* Essay 4. toward the close.

standing the title of executor, the next in kin are justly held to be heirs *in mobilibus*, as they truly are; and the confirmation is now considered in no other light than as the *aditio hereditatis in mobilibus*. The confirmation accordingly transfers to the next in kin, the property of the moveables, and the *jus crediti* of the debts; whence it follows, that if any subject perish after confirmation, it perishes to the next in kin *qua domini*. At the same time, as they are bound to pay debts and legacies *in valorem* of what they succeed to, they annex to the inventory the value of each particular subject, such as they are willing to account for. If the parties interested are dissatisfied with these values, any one creditor or legatee may apply for a confirmation *ad male appretiata*, stating higher values in his inventory. By this confirmation he takes the hazard of the moveables upon himself; and accounts for his own values. In this case alone, as far as I can discover, is there any proper ground for a confirmation *ad male appretiata*: it is unnecessary and improper in the case of an executor-dative, or executor-creditor, where the effects ought to be disposed of by public auction. This contrivance against a low appretiation, is not a little awkward, and is not much in use; for what creditor, to obtain payment perhaps of a small debt, will undertake the hazard of a large fund of executry? A more simple method, attended

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with no hazard, is to apply for a sale of the effects, as is done by creditors where an heir enters *cum beneficio inventarii*. I take it for granted, that the next in kin may take possession of the moveables at short hand, without confirmation, which will transfer to them the property of the moveables: the heirship-moveables are transferred to the heir by the same means. But then the next in kin must, in that case, reckon on the whole bent of the law against them: if the contrary be not made clearly appear, it will be presumed, that they have got sufficient to pay every debt of the ancestor. So far only they will be eased, that the presumption will not be extended in favour of legatees. At the same time, to prevent, as much as possible, the next in kin from intermeddling hiddenly, every debtor of the deceased is authorised to refuse payment, till he see a confirmation, and his debt inserted in the inventory.

From this long excursion, we return to the proposition stated at the beginning. I have endeavoured to make out, that the opinion of Hope is well founded, with respect to an executor-dative, and executor-creditor; and consequently that the opposite opinion of Stair and Mackenzie is erroneous. But, as far as I can judge, none of them are right with respect to an executor *qua* next in kin. They succeed to the moveable estate, as the heir does to the immoveable. Confirmation

firmation is the *aditio hereditatis* in the former, as service is in the latter. A service with infeftment completes the heir's right to the land-estate : confirmation completes the next in kin's right to the debts, and *ipsa corpora* of the moveables. The next in kin confirmed are, in every view, similar to an heir *cum beneficio* infeft. The property is theirs, and they are only bound to account for the value.

If now the confirmation of an executor *qua* next in kin be a title of property, as it undoubtedly is, the two following propositions are necessary consequences. The first is, That as the moveables are vested in the next in kin, any accidental loss rests upon them, and they still remain accountable for the appraised values. A fall in the market-price of the goods, will not defend them from paying these values : nor will a sudden start in the market, make them liable beyond these values. Nay, should a barn full of corn be burnt *casu fortuitu* the instant after confirmation, they must notwithstanding account for these values. The next proposition is, That even with respect to debts, there is no place for an executor *ad non executā*. The confirmation transfers to the next in kin the right that their ancestor had when alive : the *jus crediti*, being established in them, transmits of course to their representatives ; and there is no place for an executor *ad non executā*. This was found in a deliberate decision, 24th June

1737, Mitchell *contra* Mitchell of Blairgots ; which is the best authority, next to an act of parliament, for maintaining, that confirmation is the *aditio hereditatis in mobilibus* with respect to the next in kin ; that the moveable estate is thereby vested in them as formerly in the deceased ; and consequently, that they run the hazard of the goods confirmed, and transmit the same to their representatives.

In many particulars there is a strong analogy between the heir *cum beneficio*, and the next in kin confirmed executors. If the creditors be content with the value, the accidental destruction of any subject contained in the inventory, will not relieve either of them from being accountable for its value. The heir may avoid all hazards, whether of subjects or of debts, by using for his title a trust-adjudication ; and the next in kin may avoid all such hazards, by obtaining themselves to be confirmed executors-dative. In that quality, they run no risk : they levy the debts that can be recovered, sell the moveables that exist, make a dividend among the creditors, &c. and retain the surplus to themselves. If the creditors, declining to accept of the value, insist to bring the effects to a public sale, this step relieves the heir *cum beneficio*, as well as the next in kin, from any risk : it would be against conscience to force a sale of the subjects that exist, and, at the same

same time, to make them liable for the value of the subjects that do not exist.

To sum up the whole : It appears, that Sir Thomas Hope's opinion holds only with respect to an executor-dative and executor-creditor, the only cases he probably had in view ; and that the opinion of Lord Stair, and Sir George Mackenzie, holds not in any case. A decree obtained against an executry-debtor, by an executor-dative or executor-creditor, is but an inchoated execution, which, after their death, must be completed by an executor *ad non executa*. Very different is the case of an executor *qua* next in kin. His confirmation is complete execution, because it transfers to him the property of the moveables, and the *jus crediti* of the debts, leaving nothing *in hereditate* of the deceased. Confirmation accordingly subjects the executor *qua* next in kin to the risk of the subjects confirmed, and after his death transmits them to his representatives.

A R T.

A R T. XVII.

Whether arrestment or confirmation can proceed upon an infeftment of annual-rent.

AN infeftment of annualrent was originally a wadset. It was invented when, by a foolish regulation of the Canon law, interest was prohibited to be taken for the loan of money. The law was evaded by purchasing an incumbrance upon land, intitling the lender to levy rents equivalent to the interest of his money; and the money was delivered to the borrower, not as a sum to bear interest, but as the price of the incumbrance. The borrower could redeem his land by repayment of the money; and the lender could demand his money upon renouncing the incumbrance. While the incumbrance subsisted, there was no debt; and the lender had no claim against the borrower personally, till the incumbrance was renounced. This was a cumbersome mode for making money bear interest; and after interest for money became lawful commerce, a more simple and commodious mode was introduced. The borrower is taken bound personally to pay the money with interest; and to secure the payment, he infefts the creditor in his land. Here the

the personal obligation is the principal ; and the infestment is accessory only.

As an heritable bond is not a moveable subject to be carried by confirmation, it is commonly thought, that neither can it be used as a title for confirming a moveable subject. But this appears to be erroneous. In the old form, indeed, of an infestment of annualrent, no debt existed to be the foundation either of an arrestment or of a confirmation. But, in its present form, there is a personal obligation for paying the sum borrowed, upon which arrestment and confirmation may be founded, as well as upon a moveable bond. Now as a real creditor may demand payment from the executor ; and a personal creditor may demand payment from the heir ; there is nothing to bar a creditor, by an infestment of annualrent, from confirming as executor-creditor, nor from arresting a sum due to his debtor.

A R T.

A R T. XVIII.

Inhibition.

IN the New Abridgement of the English law *, we find the following passage. “As to lands, “they are bound from the time of the judgement, so that execution may be of these, “though the party aliens *bona fide* before execution sued out. So of statutes, merchant, “staple, and recognisances, which also bind the “lands from the time of entering into them.” From this passage it cannot justly be inferred, that a judgement in a process, or any of the covenants above mentioned, are real rights, or make a real *lien*, as termed in England. They have only the effect of an inhibition to bar voluntary alienations. Hence the reason why letters of inhibition are unknown in England. There is no occasion for them, if it be not with respect to a depending process, which probably has in England been thought too slight a foundation for an inhibition.

* Tit. *Execution*, p. 361.

A R T. XIX.

What degree of *mora* deprives an adjudger of the benefit of litigiousity.

LAW is reasonably jealous of a debtor, that when vexed with execution, he may be tempted to alien his subject, in order to disappoint the creditor. Law therefore bestows on inchoated execution, the privilege of an inhibition, to bar the debtor from disappointing the execution by aliening the subject; and this is the meaning of the expression, that inchoated execution renders the subject litigious. But the creditor is justly deprived of this privilege, if he make any unusual delay in completing his execution; which leads to the question, What degree of diligence is necessary to preserve the privilege? An arrestment is an inchoated execution, that renders the subject litigious. The creditor is *in cursu diligentiae*, till he obtain a decree of forthcoming; and any unusual *mora* or delay in obtaining that decree, will take off the litigiousity, and give preference to any voluntary right granted by the common debtor after the arrestment. An adjudication is completed by infestment, which, by its own nature, bestows a preference, without the privilege of litigiousity. But while the

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adjudger is *in cursu diligentiae* to obtain infestment, the privilege of litigiousity secures the land contained in the adjudication from being aliened by the debtor. And here the question arises, What degree of diligence is necessary to preserve the privilege of litigiousity entire. The first step for obtaining infestment, is to charge the superior; after which the adjudger must stop, till the superior find leisure to infest him. So far clear. But, in order to preserve the privilege, is it necessary that the adjudger proceed to a charge against the superior? It is universally held, that the charge is necessary. This is the opinion of Lord Stair: "And generally voluntary rights are
 " excluded, being granted after the denunciation
 " of lands to be appraised, until infestment be obtained, or a charge against the superior; all
 " which is the creditor's being *in cursu diligentiae*;
 " and after a competent time for obtaining
 " infestment, or charging the superior, any posterior or voluntary right is preferable to the
 " appraising; as was found in the competition of
 " the creditors of Langton *." And again †,
 " But since the act of parliament, bringing in
 " appraisers *pari passu*, the first effectual appraising is declared to be either by infestment, or
 " charge against the superior to grant infestment,
 " which is ordinarily sustained without further

* Book 3. tit. 2. sect. 20.

† sect. 29. of the same title.

" insisting."

“ infisting.” This opinion has been followed by the court of session in every decision. Thus it was found, “ That denunciation of apprising makes the subject litigious ; after which the debtor cannot make any voluntary alienation in prejudice of the apprising, provided the appriser proceed in diligence to obtain infeftment, or charge the superior *.” Again, “ A compriser being *in mora* for twelve or thirteen years, not obtaining infeftment, not charging the superior, nor using diligence to recover mails and duties, a voluntary disposition for a price paid granted after the comprising, with infeftment upon it, was preferred †.” Again, “ Denunciation of apprising renders the subject litigious ; after which every voluntary alienation by the debtor, even for a price told down, to prevent the appriser *in cursu diligentia*, is ineffectual : but where the appriser was silent and negligent by the space of ten years without infeftment or charge, and without pursuing for mails and duties, he was not allowed to plead the litigiousity, since it could not be said that he was *in cursu diligentia* ‡.”

These great authorities notwithstanding, I cannot help doubting, whether a charge against the

* Stair, 23d July 1674, Johnston *contra* Johnston.

† Fountainhall, 25th February 1680, Earls of Southesk and Northesk *contra* Laird Powrie.

‡ Stair, 8th February 1681, Nielson *contra* Ross.

superior be necessary. Whatever necessity there may have been originally for infeftment or a charge, to preserve the privilege, I see not, as our law stands at present, that an adjudger during the legal is bound to do any sort of diligence. I see not that *mora* can be imputed to him, for not proceeding to charge the superior, or to apprehend possession. While an apprising was a judicial sale of the land, an appriser could not possess without infeftment: the superior was intitled to have a vassal; and he had an interest to insist for payment of a year's rent for change of the vassal *. But an apprising, during the legal, having degenerated to be a *pignus prætorium* only, it was thought hard upon the debtor, to oblige the appriser, during the legal, to pay a year's rent to the superior. The court accordingly came to a resolution to permit the appriser to possess during the legal, without demanding infeftment, and consequently without paying a year's rent to the superior †. And this has been the constant practice ever since ‡. Now, if an adjudger be not bound to take infeftment during the legal, he cannot be bound to charge the superior to give him infeftment. It would indeed be absurd to make such a charge

* Stair, 22d July 1665, Johnston *contra* tenants of Auchincorse.

† Stair, 3d December 1672, Hay *contra* Earlston.

‡ See Stair, book 2. tit. 3. sect. 30.

a necessary step of diligence, when the adjudger is neither willing nor obliged to accept of infeftment. Neither can the forbearing to take possession, be imputed to the adjudger as a *mora*; because his right, which is a security only, leaves him at liberty to levy the rents or not, as he finds it convenient. Adjudgers are commonly unwilling to subject themselves to a count and reckoning: they will have their money in a lump, or the land, instead of their money, when the legal expires. Weighing these particulars, there appears not any foundation for the imputation of *mora* during the legal, though the adjudger neither charge the superior, nor enter into possession. And with respect to the decisions above mentioned, in two of them the legal is mentioned as expired; after which undoubtedly an adjudger is *in mora*, if he neither take possession, nor charge the superior to infeft him.

It may possibly be objected, that as, during the legal, an adjudication is not an effectual diligence without a charge against the superior, an adjudger is really *in mora* if he stop short, and make not his diligence effectual. It is true, that the act 1661 declares an adjudication to be effectual upon which infeftment has followed, or the first exact diligence for obtaining infeftment; and it has been found by the court of session, that a simple charge against the superior is exact diligence in the sense of the statute. But re-
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mark, that this act passed while both law and custom obliged apprisers to take infestment, without which their apprisings were reckoned incomplete, even during the legal. Our present practice differs widely. As adjudgers are thought to be rigorous who take infestment during the legal, the legislature, I am convinced, would not require, during the legal, either infestment, or a charge against the superior. However this be, the statute has laid down a rule for ranking competing apprisers ; and the statute must be obeyed. But there is no statute upon the present point. An adjudger, in order to exclude other creditors who adjudge after year and day, must charge the superior ; but though he forbear to charge during the legal, the subject continues to be litigious, so as to exclude every voluntary conveyance by the debtor done during the legal.

A R T. XX.

What title necessary in a process.

Title, in popular language, is used as synonymous with right ; as, for example, *I have right to reap the fruits of a certain field*, and, *I am intitled to reap the fruits of a certain field*, have the same meaning. But in law-language, title is distinguished from right : it means the evidence of a right. I have right to a legacy by a testament ; and the testament is my title for demanding payment. A bargain of wheat is vouched by mutual missive letters ; and when I sue for performance, the defendant's missive is my title. In some cases, the same writing is the pursuer's title, and also the *means* by which he acquires his right. Example : My father dies creditor in a bond, heritable by a clause of infeftment, or by a clause excluding executors. The debt is vouched by the bond : a general service is the *means* by which I acquire right to the debt ; and it is also my *title* in a process against a debtor for payment. A special service, with infeftment, are the *means* by which the property of the predecessor's estate is vested in the heir ; and it is also the heir's *title* in every process relative to the estate.

Title

Title is defined by Lord Coke * to be the *means* by which a right is established. This definition is imperfect: consent is a *means* by which many rights are established, and money is another; yet neither of these is held to be a title. On the other hand, there are many *titles* that are not the *means* of establishing a right. A minute of sale is evidence of the bargain, and is also the vender's title in an action against the buyer for the price; but consent, and not the minute of sale, is the means by which the right is established. Sometimes, indeed, as above mentioned, the means by which a right is established is, at the same time, the pursuer's title; but this is far from being always so.

The pursuer's right is, in several instances, notorious, requiring no evidence. A young man, bred up in his father's family, claims the rents of his father's estate as his son and heir: his right arises from his apparenacy; and his apparenacy, being notorious, requires no evidence. This, in law-language, is expressed by saying, that the pursuer requires no title for carrying on such process.

Lord Stair divides titles into two kinds; original, and by progress †. The evidence of an original right, is an original title. A bond for a sum of money, is a proper example: a right is

* Coke upon Littleton, sect. 649.

† Institutes, book 4. tit. 38. sect. 19.

created to the creditor against the debtor by consent ; and the bond, being the evidence of the right, is the creditor's title in an action for payment. When a right is conveyed from one person to another, the evidence of the conveyance is the purchaser's title in every process for making the right effectual. Infeftment on a retour, confirmation of an executor, an assignment, a disposition, an adjudication, are titles by progress.

The title necessary in a reduction on the head of deathbed, is original. A deed, though granted on deathbed, is effectual against the granter ; and as it cannot be challenged by him, neither can it be challenged by any in his right. But as an heir is protected by law against the deathbed-deeds of his predecessor, such a deed is challengeable by the heir in his own right. Accordingly, to found the reduction, the only evidence required is, that the pursuer is heir ; and when that is notorious, as it commonly is, we say, that the pursuer requires no title. But when the relation is so distant, as to require evidence, the evidence, whether by writ or by witnesses, is the pursuer's title. As the title here is original, the heir's serving to his predecessor will not bar the reduction ; for he represents not his predecessor with respect to a deathbed-deed, against which he is privileged by law. He resembles an heir of entail, who represents not his predecessor as to

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any alienation of the entailed estate. But in reducing the deathbed-deed, the heir's service cannot be his title ; for the reduction is founded on his own right, not upon his being *eadem persona cum defuncto*.

Next in order come titles by progress. A special service, with investment, is the heir's title in every action relative to the subjects thus conveyed to him ; and a general service is his title in every action relative to subjects conveyed to him by the general service. An heir, claiming upon a disposition to land made to his predecessor, must have a general service for his title. The general service answers two purposes : it is, first, the *means* of transferring the subject to the heir ; and is, next, his title in every action relative to the subject.

The right a man has to reduce a disposition of land unduly obtained from him, is transferred to his heir by a general service, which consequently is the heir's title to carry on the reduction. Example : A man is, by fraud, induced to grant a disposition of his land, and the disponent is invest on the procuratory. The question is, What title is necessary to the heir, after the disponent's death, in a reduction on fraud and circumvention ? He cannot serve heir in special to land which did not belong to his predecessor at his death. For the same reason, he cannot be charged to enter to it upon a trust-bond, granted in
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order to lead an adjudication. Neither will his apparency serve him as a title, because he cannot specify himself to be heir-apparent in the land. A general service is the title, because it conveys to him his predecessor's right to challenge the disposition elicited from him by fraud and circumvention. But may not the heir sue in his own right, without necessity of a general service; which ought to be avoided, if possible, because it subjects him to all his predecessor's debts? The following argument may be urged in his favour. Justice forbids the fraudulent acquirer to retain the subject. He is bound, in conscience, to restore it to the disponent; and, after his death, to the heir. The heir consequently has right to demand a conveyance by a process, if not done voluntarily. The argument appears well founded, supposing the fraud and circumvention to be admitted. And upon that medium it was found, that the heir-apparent who could challenge the disposition, might ratify it; and that his ratification did, after his death, exclude all the disponent's other heirs *. But what if the fraud and circumvention be denied? Will it be sufficient for the heir to bring a proof of it in his process of reduction; which proof will be his title, and, at the same time, found the reduction? If the pursuer succeed in his proof, the defendant has no just cause of complaint. But he may fail in

* 17th February 1761, Gordon *contra* Ogilvie.

his proof; and it would be unjust to oblige the purchaser to sustain a process which could not afford him an *absolvitor* but against the pursuer only, leaving him open to other heirs after the pursuer's death. At that rate, he might be subjected to processes without end. The law will never permit such a grievance. And yet, on the other hand, it would be equally grievous, to tie up the hands of an heir from challenging a gross imposition upon his predecessor, unless the heir will run the risk of being reduced to beggary by his ancestor's creditors. In my apprehension, the grievance on both sides may be removed, by the heir's taking out a general service, limited, in express terms, to the right his predecessor had to challenge the disposition on fraud and circumvention. This mode will secure the acquirer, if he obtain an *absolvitor*, from being liable to any other heir: And it will secure the heir from being liable to his predecessor's debts, beyond the profit he makes by the process.

Suppose now the fraudulent acquirer not to be infest. The heir, in that case, is at no loss for a title. He may complete his right to the estate, by a special service, by an adjudication upon a trust-bond, or by a general service in the form above mentioned. Any of these will be a good title for reduction.

Take another example: A disposition of land is obtained from a minor under the value, and the

the disponee is infeft. The disponer, in his own right, may insist in a reduction on the head of minority and lesion; and his heir may insist, in the same process, upon the title of a general service, qualified as above mentioned, if he be afraid of debts. Supposing the disponee not to be infeft, the heir has the same titles to chuse upon, that he has in reducing a disposition obtained from his predecessor by fraud.

An action of improbation is of two kinds. One challenges deeds affecting the pursuer's land; the other challenges deeds affecting his predecessor personally. To carry on the former, the pursuer must instruct that he is proprietor: to carry on the latter, he must instruct, that he is personally liable to the debts of his predecessor. For if he be neither proprietor, nor be personally liable, he has no interest to raise a process of either kind. An heir accordingly, in order to carry on an improbation of deeds affecting the family-estate, must first enter heir, and complete his right to the estate by infeftment. And in order to carry on an improbation of debts affecting his predecessor personally, a general service is necessary as a title; because it subjects him to all the debts and deeds of his predecessor.

With respect to a purchaser of land, it is a rule, That, in order to challenge any infeftment on the land, he must be infeft; because none but the proprietor has right to challenge any deed affecting

ing his land. An adjudger, it is true, even without infeftment, has right to the rents; and consequently may challenge any deed, not excepting an infeftment, so far as it obstructs his levying the rents. But as his right carries him no farther, an action will not be sustained at his instance, to reduce the infeftment *funditus*. Whether a decree of adjudication may not be sustained as a title to carry on a tentative process, shall be examined afterward.

What is said upon the titles necessary for challenging real rights, is applicable to what are necessary for challenging personal rights. If an assignment to a bond for borrowed money, procured by unlawful means, be completed by intimation, the cedent may, in his own right, challenge the assignment; and so may his next in kin, upon confirming his predecessor's right of challenge. Confirmation is necessary, because it protects the assignee, if he obtain an absolvitor, against any future challenge. If there be no intimation, the next in kin may confirm the bond itself, which confirmation will be their title in a reduction of the assignment.

Having discussed titles by progress in the person of an heir, we proceed to titles necessary to creditors. There is no occasion to take under consideration an action against the debtor himself, the title of which is obvious. What we have in view, are actions that a creditor may carry on
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in his debtor's name. With respect to a reduction on minority and lesion, on inhibition, or on deathbed, which the person directly interested declines to carry on, it is a matter of some nicety, whether his creditors can carry it on. I give, for an example, an alienation on deathbed, which the heir, who is bankrupt, refuses to challenge. His creditors have not right, at common law, to bring the reduction; for as the privilege is personal to the heir, it cannot be exercised by his creditors, unless upon a mandate from him. But it being unjust in a debtor, to withhold from his creditors any subject, or any privilege, that may contribute to their payment, it is his duty to insist in the reduction; and if he be refractory, a court of equity will empower his creditors to carry it on in his name. This is the only remedy, where the purchaser from the predecessor stands infest. But where he is not infest, the creditors have no occasion for an extraordinary remedy: they may adjudge the land, after charging their debtor to enter heir. This adjudication will transfer the land to the creditors; and their right to the land intitles them to reduce the deathbed-deed.

The following is an example of the same kind. A man, from whom a disposition of land has been obtained by fraud, becoming bankrupt, finds no benefit to himself in bringing a reduction. His creditors, if the purchaser be infest, cannot ad-
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judge the land : but they are authorised in equity to bring a reduction in name of the disponent, their debtor ; and the court of session, as a court of equity, will sustain the reduction, upon the creditors producing their vouchers of debt, which is their title.

But what if the debtor die before raising the process, or before it be concluded ? The creditors must charge the debtor's heir to enter heir in general ; and having, by that means, subjected him to their debts, they must proceed to what is termed *a general special charge*, charging the heir to enter to all heritable subjects which the predecessor died possessed of without being infeft. The creditors will thus obtain an adjudication of all subjects that are carried by a general service, including the predecessor's right to reduce the disposition obtained from him by fraud ; and this adjudication is a title to carry on the reduction. If the heir renounce, an adjudication *contra hereditatem jacentem* will be the title. Suppose next, that infeftment has not passed upon the fraudulent disposition. In that case, the debtor remaining proprietor, a special charge against his heir will empower the creditors to adjudge the estate itself ; and the adjudication will to them be a good title to reduce the fraudulent disposition.

To save a tedious and expensive circuit of diligence against the heir, when the debtor dies
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before the process of reduction is completed, it will be a prudent step, to begin with adjudging the land from the debtor himself, where the fraudulent disponee is not infest; or with adjudging their debtor's right of challenge, where the fraudulent disponee is infest. Upon that title, they may carry on the process of reduction, even after the death of their debtor.

The same rules are applicable to a reduction carried on by creditors founded on their debtor's minority and lesion, or carried on by them on the ground of interdiction. With respect to a reduction on the ground of inhibition, which the creditors of the inhibitor desire to carry on, they may arrest the debt on which the inhibition is founded: a decree of forthcoming will transfer to them from their debtor the *jus crediti*; which of course will intitle them, as judicial assignees, to carry on the process of reduction.

With respect to a process of removing, it is evident in the first place, that the proprietor's charter and seisin make an effectual title, to remove every man from his land who has not a current lease to defend his possession. In the next place, though a man who has a disposition to land without infestment, is not proprietor; yet if he grant a lease, and take from the lessee an obligation to remove at a term specified, the obligation conveyed to a new lessee, will intitle him to bring a removing in his own name. His

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lease gives him an interest to carry on the process; and the obligation is his title. In the third place, with regard to a tenant who possesses by a lease from a former proprietor, the infeftment of the present proprietor is a good title for removing that tenant when the lease is at an end: but he cannot empower his own lessee to carry on the removing in the lessee's own name, otherwise than by conveying the property to him. A mandate to carry on the removing in the proprietor's name, will be effectual; but a mandate to carry on the removing in the lessee's own name, is *ultra vires* of the proprietor.

I close this essay with examining what title is necessary in a tentative process, such as paves the way to what is ultimately intended. An exhibition *ad deliberandum*, is a proper example of a tentative process: it is of no benefit to the pursuer, but as affording him means to deliberate whether it be his interest to enter heir or not. An heir-apparent has a year for this deliberation; and the law gives him inspection of all writings that may enable him to form a prudent resolution. This action then is founded on the pursuer's personal privilege; and the notoriety of being heir-apparent is his title.

I proceed to other examples. Before an inhibitor can challenge a disposition granted by his debtor, common law requires, that he adjudge the subject aliened; because, if he have no right
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to the land, he has no interest to challenge any deed affecting it. An adjudication, therefore, is the inhibitor's title to carry on the process of reduction; and it is beside the pursuer's title to the land, if he prevail in the reduction. But what if he do not prevail? In that case, both parties suffer by the adjudication: the pursuer loses the expence he was at in adjudging; and the defendant's property is burdened with an adjudication, which, though rendered ineffectual by the absolver, makes however an obstruction in a sale. Upon that account, it has been for many years the practice, to sustain a reduction on the ground of inhibition, as a tentative process, without a preparatory adjudication. If the pursuer succeed in his reduction, he then proceeds to adjudge: if the defendant be affoizied, his land is free from the adjudication. The absolver, at the same time, secures the defendant against all future challenge: it is effectual against the pursuer; and it must be equally effectual against those who derive right from him to the bond upon which the inhibition proceeded, whether heirs or singular successors.

There was occasion above to observe, that a decree of adjudication is not a legal title to challenge any infestment upon the land adjudged; but whether it may not be sustained as a tentative title, shall now be considered. It is hard to oblige the adjudger to be at the expence of an in-

sestment, while the success of his reduction remains uncertain : and it is hard upon the defendant to submit to the pursuer's inestment, when he is ready to shew, that the land belongs to him, and that the pursuer has no right. At the same time, where a decree of adjudication is the pursuer's title, an absolvitor is not less effectual against him and his heirs, than if he had been inest. A decree of adjudication accordingly has been sustained of late years, as an equitable title for challenging every inestment of the land adjudged.

ART.

A R T. XXI.

Arrestment jurisdictionis fundandæ gratia.

IN a process for payment against an Englishman resident in England, who was cited at the market-cross of Edinburgh, pier and shore of Leith, it was in his behalf pleaded, That he was not subjected to the jurisdiction of the court, and therefore that the process could not be competent against him. Answered, The person cited has, or may have, effects in Scotland; and an action must be competent against him, in order to attach such effects. Replied, Whatever be the consequence, no inconvenience will support a process before an incompetent court. At the same time there is no occasion to proceed so irregularly: foreign effects locally in Scotland, are subjected to the courts of Scotland, though the proprietor be not; and by a real action, may be adjudged, or made forthcoming to a creditor for his payment.

More particularly, moveables locally in Scotland, to whomever belonging, are subject to our courts of law, and at their disposal. A court will listen to a claimant setting forth, “That his debtor is a
“foreigner, not within the jurisdiction of the
“court; but that certain effects of his, specified,
“happen

“ happen to be within the jurisdiction ; and praying, that these effects may be adjudged to him for his payment.” To that end, the claimant is admitted to prove the debt, whether by writ or witnesses. He may even have the benefit of the foreigner’s oath, upon proper notice being given ; and if the foreigner neither appear personally, nor grant a mandate to enter an appearance for him, he is justly held as confessing the verity of the debt. The debt being thus ascertained, a decree is pronounced, not against the debtor, but against the effects specified in the claim, ordering them to be sold for the claimant’s payment ; the surplus, if any be, to remain *in manibus curiæ* for the use of the debtor. Very different is a process for payment against a person subject to the jurisdiction of the court. The jurisdiction supports the personal citation : the citation supports the decree against the defendant ; and the decree supports execution, whether against the defendant himself or against his effects.

With respect to a process to make forthcoming foreign moveables to a creditor, an arrestment of the moveables is commonly the first step ; because it detains the moveables within the jurisdiction of the court from which the arrestment issues ; and upon that circumstance all depends. The process of adjudication or forthcoming follows ; and if the judge upon evidence be satisfied that the claim is just, he

he decrees these moveables to be made forthcoming to the claimant for his payment. And this concludes the process ; for there can be no decree against a man who is not subjected to the jurisdiction of the court.

It remains only to be observed, that the arrestment, though termed *arrestum jurisdictionis fundandæ gratia*, is not the foundation of the jurisdiction : on the contrary, it implies a jurisdiction already founded ; as neither an arrestment nor any other diligence can proceed but by authority of a court having jurisdiction. The local situation of the effects within the territory of the judge, founds his jurisdiction over the effects, though not over the person of the proprietor. It is by virtue of his jurisdiction, that he grants warrant for the arrestment ; and the arrestment is of no other use but to detain the goods within the territory. It is indeed a step that a cautious man will not omit ; but the claim is well founded without it.

A R T. XXII.

Litifcontestation.

WHile judges were arbiters merely, which was their condition originally, litifcontestation was in reality a judicial contract; and the decree differed not from a decret-arbitral *. Jurisdiction arrived at greater perfection in course of time: Judges were established by the sovereign, to determine differences between parties, with power to compel obedience. Consent was no longer necessary; and litifcontestation ceased to be a judicial contract. Lawyers call it now a *quasi-contract*; a term approaching to a contract in sound, but far distant from it in meaning, if it have any meaning.

Nothing is more common in law, than effects kept up after their causes have ceased. There are accordingly regulations both in England and Scotland, built evidently on the supposition of litifcontestation being a contract, as it was originally. In the English form of process, if issue be joined even on the slightest dilatory defence, it concludes the cause. The defendant, succeeding in his proof, is absolved: if he fail in his proof, sentence passes against him, without permitting

* Historical Law-tracts, tract I.

him to plead any other defence, peremptory or dilatory. This cannot be explained upon any principle, other than that litiscontestation is a contract, binding the parties that the proof shall determine the cause.

There are regulations of the same kind in Scotland. Take the following instance. In a process on the passive titles for payment of debt, the defendant, aware that the stating peremptory defences would be a virtual acknowledgement of the passive titles, keeps these in reserve, and betakes himself to a denial of the passive titles. The pursuer offers a proof of them: issue is joined, the passive titles are proved; and a decree for payment passes of course. The defendant applies to the court against the judgement of the Ordinary, and prays to be reponed to his peremptory defences. The answer commonly made, is, "That
" the decree is regular; because litiscontestation
" is a judicial contract, implying the defendant's
" consent to pay the debt, if the passive titles
" shall be proved against him; that the defend-
" ant may in equity be reponed, upon paying
" the expence of the act; but that he must be
" confined to an instant verification of his per-
" emptory defences, without being allowed a
" new term for proving, as there cannot be two
" acts of litiscontestation in the same cause." The practice accordingly is, to repon the defendant to his peremptory defences, confining

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him

him to an instant verification of them, and making him pay the expence of the act. This is obviously a remnant of our old law, and a regular proceeding when *litiscontestatio* was really a contract. But now that it has ceased to be a contract, the defendant ought not to be barred, either at common law or equity, from proving his defences one after another. Why should he be reduced to the necessity of joining issue on the passive titles, and of losing his cause if the passive titles be proved? Why not permit him to plead, that though he is found liable for his predecessor's debts, yet that he has certain good exceptions against the debt claimed? What has he done to bar him from insisting on any exceptions that he cannot instantly verify? And why should he be subjected to the expence of the act? Here is obviously a hovering between the old and the new law; the former not totally laid aside, nor the latter totally adopted.

With regard to form, there could not indeed be two acts of *litiscontestatio*, when the joining issue on any fact implied a mutual consent that the proof should conclude the cause. But as jurisdiction at present requires no consent, I see no absurdity in a plurality of *litiscontestations*. They are hurtful, it is true, by swelling the expence, and prolonging the process; but these inconveniences may be prevented, by a regulation that all the defences shall be stated at the beginning of
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the cause, and that one act of litiscontestation shall be pronounced upon such of them as require proof. And where the defendant states his peremptory defences by order of the court, his obedience to that order cannot infer an acknowledgement of the passive titles.

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ART.

A R T. XXIII.

Whether action can be sustained to make effectual a smuggling-contract.

BY 11th George I. cap. 30. sect. 8. "No tea
" shall be imported into this kingdom from
" any place but that of its growth, on pain of
" forfeiture."

If it be unlawful to import tea except from the place of its growth, no man can be bound by a contract to import it. The contract is null and void, as all contracts are that bind one to transgress the law. There is another objection, arising from the very nature of a court of justice. Courts of justice are instituted, to enforce laws natural and municipal, not to overturn them. But to sustain action on such a contract, would be to act in defiance of law: it would be a breach of trust, of the same nature, though not the same in degree, as to sustain action for a bribe to commit murder or robbery.

This reasoning has prevailed on the judges of the court of session, to deny action to natives upon smuggling-contracts. But with respect to foreigners, who are not bound by the laws of Britain, it continues to be a doubt, whether action can justly be denied to them. For removing
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that doubt, the following considerations are suggested.

In the first place, It is the privilege of every state to regulate matters within its own territory. The legislature may, in particular, prohibit certain goods to be imported, whether by natives or by foreigners, under certain penalties ; which obliges every merchant to inform himself of the commercial laws of the foreign countries in which he traffics. If he go personally into a foreign country, he is subjected to its laws ; and if he send goods there, they are equally subjected. Foreigners undoubtedly must submit themselves to the laws of this country, as far as they act within it.

Secondly, The law of nations, respecting the municipal laws of every country, declares it an act of injustice in a foreigner to attempt any violation of them. It is wrong in a foreigner to foment a rebellion in Britain, though he never set foot in it ; and it is equally wrong in him to hire a person to commit murder in Britain. What should be his punishment when found in this kingdom, is not clearly established by the law of nations ; but that he merits some punishment, will not be controverted. And it clearly follows, that action ought not to be sustained to him here, if he should think of claiming performance of any covenant relative to the wrong done. This must also hold, where he knowingly transgresses
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any law purely municipal, such as the smuggling prohibited goods into Britain, or the being accessory to the smuggling.

And now more directly to the statute under consideration. It is impersonally conceived, "That
"no tea shall be imported into this kingdom but
"from the place of its growth." Here no distinction of persons is made: the prohibition reaches every person, native or foreigner. If a Gottenburg merchant send a cargo of tea to his correspondent in Britain, to be sold for his behoof, the cargo is lawful seizure by statute; and is accordingly condemned in exchequer, of which we have daily instances. The cargo, till it be sold, continues to be the property of the Gottenburg merchant; and as no man can be forfeited of his property who has committed no delict, it must be admitted, if our law be just, that the foreign merchant has been guilty of a delict in landing his prohibited goods here. And that it is a delict by the law of nations, is made evident above.

If the actual landing the cargo here be criminal, a commission by the foreign merchant to his factor here for smuggling the cargo, cannot be innocent. It is wrong in several views: first, as a means to an unlawful end; and, next, as an accession to a crime, intended to be committed by a native; for that the native is criminal, no person doubts. It follows, that the factor is not bound

bound to fulfil the unlawful commission; and that no action ought to be sustained against him for damages.

I put another case. A merchant in Scotland commissions a quantity of tea from a merchant in Gottenburg. Ought action to be sustained to the latter against the former, for the price of the tea sent and received? This question will receive different answers in different circumstances. A commission for tea to be delivered to a shipmaster named, without specifying the destination of the vessel, is lawful; and the foreign merchant ought to have action here, without being obliged to say or to know what has become of the cargo. If it have been smuggled into Scotland by the Scotch merchant, his Gottenburg correspondent, who had no accession to the wrong, is not answerable. But where the Gottenburg merchant is informed of his correspondent's intention to smuggle, and takes measures accordingly for concealment, the contract is unlawful on both sides. It is admitted to be unlawful as to the Scotch merchant; and it is unlawful as to the other in a double respect; first, as violating the laws of Britain; and, next, as an accession to the crime of the Scotch merchant. And our judges would be accessory to the crime, if they should sustain action upon it. Here the rule is applicable, That *in turpi causa potior est conditio possidentis*. The case is in effect the same, where the goods are commissioned to be
imported

imported into Britain, without mentioning that they are intended to be smuggled. For the foreign merchant knows, or ought to know, that they cannot be imported otherwise than by smuggling.

For illustrating this doctrine, I put a similar case. In the year 1745, a number of Scotch rebels commission from a merchant in Rotterdam a cargo of powder, ball, and other warlike stores, which he furnishes, knowing of the rebellion; and after the rebellion is quashed, he brings his action in the court of session for the price. Would a British court sustain such an action? They would be accessory to the wrong, if they did. Common sense must suggest to the foreign merchant, that he who knowingly transgresses the law of Britain, cannot expect the aid of that law to make his transgression beneficial to him. We deny the benefit of our courts of justice to a nation at war with us, however innocent the person may be who brings the action. Is it not still more reasonable to deny that benefit to a foreigner, who is not innocent, but has knowingly contemned our law?

Suppose now the foreigner to have been ignorant of the law prohibiting tea to be imported but from the place of its growth. Will this intitle him to an action for the price? I answer, that it will not intitle him, more than it will intitle him to the tea itself seized in Scotland. It was his duty to have been better informed; and no man

can avail himself of culpable ignorance. But supposing his ignorance to be excusable, yet such ignorance can only relieve from punishment: it will not relieve a man even from damages; far less will it intitle him to an action in contradiction to the law of the land. To reward ignorance with a privilege that knowledge is not intitled to, would indeed be extremely Gothic.

I conclude with a separate consideration. For performance of a smuggling-contract, action is not sustained to a native against a foreigner; and it would be inconsistent with the rules of equity, to sustain action to the latter against the former.

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ART.

A R T. XXIV.

How far writs are probative.

THE history of promises and covenants makes a branch of Historical Law-tracts * ; particularly, the history of the writ termed in England a *bond in judgement*, and in Scotland a *regi-strable bond*. Some few gleanings only remain, chiefly with regard to the noted exception, *Non est factum*.

In the tract quoted, it is laid down, that before the art of writing was common, a writ was vouched by the seal of the granter ; and that if he acknowledged the seal to be his, the writ was good evidence against him. Thus, Glanvil, “ Ubi sigillum suum esse publice recognoverit in curia, cartam illam precise tenetur warrantizare, et conventionem in ipsa carta expressam, omnino servare sine contradictione †.” But if the defendant denied the seal to be his, or *quod non est factum*, as expressed in England ; the plaintiff was burdened with proving, that it was the defendant’s seal. This fact being proved, the sealing was presumed to be the operation of the defendant ; unless he could bring positive evi-

* Tract 2. † l. 10. cap. 12. ; Reg. Maj. l. 3. cap. 8.

dence,

dence, that the seal was stolen from him, and applied by another hand.

The statute 117. parl. 1540, on a preamble that a seal may be lost or forged, enacts, “ That “ in time coming, no faith be given to any writing under seal, without subscription of the party.” Here, the acknowledging the subscription vouches the deed, as the acknowledging the seal did formerly. And it also banishes all suspicion of falsehood, as a man’s subscription cannot be stolen, though his seal may.

An explicit acknowledgement of the seal or subscription, is not requisite to found a decree. An implied acknowledgement is sufficient, implied from pleading other defences, and forbearing to plead *quod non est factum*. But as a seal at a writ is no evidence that the impresson was made by the seal of the defendant; so the letters of the defendant’s name at the foot make not evidence that the subscription is his: the objection *quod non est factum* is competent equally in both cases; and the objection is a negative, which burdens the plaintiff with proving the subscription to be the defendant’s. Thus in a process against me for payment of the sum in a bill of exchange or promissory note, the letters of my name at the foot afford not evidence that the subscription is mine; and for that reason, I am admitted to plead *quod non est factum*. So far the law of England and of Scotland are the same.

The law of England admits not a decree in absence. In Scotland, a decree in absence is effectual; and such a decree, founded even on a bill of exchange, or on a promissory note, may be carried to execution. From the defendant's declining to appear, the subscription at the bill or promissory note, is presumed to be his.

The law of England continues the same to this day, with respect to every sort of writ, excepting a bond in judgement, where it is a rule, That matters of record prove themselves, and admit not any averment against them *. But in Scotland, the act 1681, requiring witnesses to subscribe, has produced an alteration. The subscriptions of the witnesses vouch the subscription of the party; which bars him from pleading, *Non est factum*, and obliges him to undertake a proof that the writ is forged. But this alteration takes place only in writs that require witnesses. Other writs, such as bills and promissory notes, stand on their original footing.

A difference takes place in our practice, between a writ having a clause of registration, and a writ requiring witnesses, but not having a clause of registration. The former cannot be challenged but in a regular process of improbation; but against the latter improbation may be proponed as an exception †.

* New Abridgement of the law, vol. 2. p. 306.

† Stair, book 4, tit. 4, sect. 39, 40.

Of writs that require not witnesses, several are probative *per se*; and admit not the defence of *Non est factum*, more than when there are subscribing witnesses. A holograph writ is one of these: it is presumed to be genuine from the difficulty of forging a writ of any length; and to overturn that presumption, a proof of forgery is required. The party's subscription to an account of furnishings is another instance; the subscription being fortified by the account. A receipt of rent by a landlord to his tenant, is a third instance. That it is the landlord's subscription, is vouched by several collateral circumstances, the extent of the rent due, the known term of payment, and the practice of paying regularly. I shall add but one instance more, which is, a missive letter, especially *in re mercatoria*. Merchants have not leisure for holograph missives; and yet missives are essential in commerce.

A R T.

A R T. XXV.

Qualified oath.

W Hen in a process a fact is referred to the oath of the pursuer or defendant, he who gives the oath may have occasion to qualify it by the addition of circumstances. Where the circumstances added are intimately connected with the fact acknowledged, so as to require no proof but the oath itself, they are termed *intrinsic qualities* : where they require other proof, they are termed *extrinsic qualities*. The following considerations may tend to explain the difference.

First, Where the libel is referred to the oath of the defendant, every fact or circumstance mentioned in the oath that resolves into a denial of the libel, is intrinsic ; because, if the libel be not proved, an absolvitor follows.

Second, Whatever is a proper cross interrogatory to a witness, may be added by the defendant to his oath. For had the pursuer taken a proof by witnesses, it would have been competent to the defendant to put cross interrogatories ; and he must not be cut out of his privilege by being chosen as the only witness.

Third, If an agreement be referred to the oath of the defendant, every circumstance is intrinsic

fic that imports it to have been altered, or passed from ; for such circumstance is in effect *pars ejusdem negotii*. But where the agreement is fulfilled, and brought to its final conclusion, no after alteration adjected to the oath is intrinsic. Thus, where a bargain for a horse, with delivery, is referred to the defendant's oath, in order to recover the price, if the bargain and delivery be acknowledged, which fulfil the bargain on the pursuer's part, an addition to the oath, that the bargain was afterward passed from, and the horse redelivered, is not *pars ejusdem negotii*, but must be proved otherwise than by the oath.

Fourth, If the libel be not relevant as laid, the defendant may either object to the relevancy, and refuse to depone ; or he may add circumstances to his oath, that resolve in a denial of the libel as it ought to have been laid ; and these circumstances will be intrinsic.

Fifth, Where a defendant has exceptions against a relevant libel referred to his oath, he ought to state these exceptions before deponing, in order that the pursuer may take another mean of proof, if he be unwilling that the exception should be proved by the defendant's oath, as well as the libel. See act of federunt, 7th December 1613. From this act we learn, that if the defendant be permitted to depone after stating his exceptions, and insert these exceptions in his oath, they will be held as intrinsic. But if *rest-*
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ing owing simply be referred to oath, there is no need beforehand to state any exception subversive of the debt, payment, for example, or innovation. For as the defendant is at liberty to deny *resting owing* simply, he is at liberty to mention in his oath, the facts that prove the debt not to be *resting owing*. Here a difference is made in our dicisions, between extinguishing the debt by payment in money, and extinguishing it by delivering goods in satisfaction. The latter is not sustained as intrinsic ; for what good reason, I have not discovered.

Sixth, If the defendant add to his oath an exception that is not competent to be proved by witnesses, it will be rejected as extrinsic. Example : A bond of borrowed money being lost, the debt is referred to the defendant's oath. An addition to the oath, That the debt was paid, is not intrinsic. For he cannot prove, by his own oath, what is not competent for him to prove by witnesses ; and if he neglected to take a written document of the payment, he has nothing left for proof but the pursuer's oath. But the following addition will be intrinsic, That the bond was not lost, but delivered up to him the defendant upon payment. The like in a forthcoming at the instance of an arrester, who refers the debt to the oath of the arrestee, because he is not possessed of the bond.

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The foregoing rules are also, in a good measure, applicable for determining the difference between intrinsic and extrinsic qualities, in an oath emitted by the pursuer upon a reference by the defendant.

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ART.

A R T. XXVI.

Evidence with respect to deathbed.

Property originally included not a power to alien, but only to use and enjoy *. But as this was a restraint against nature, it crept in gradually, that a man might dispose upon small portions of his heritage^o for necessary causes †. At the same time, this innovation was permitted with so great reserve, that such a deed was not sustained, if executed in deadly sickness, as the law expresses it, or on deathbed. “Where a man “in deadly sickness makes an alienation, which “in health he did not think of, the same is presumed to be done through trouble of mind, “and not deliberately ‡.” Liberty to dispose of a part for necessary causes, was enlarged by degrees, till it became law, that property includes a power of alienation, and that it may be disposed of without any cause but the will of the proprietor. In every step however that extended property, the prohibition of aliening in deadly sickness, or on deathbed, continued inviolable.

* Historical Law-tracts, tract 3.

† Reg. Maj. 1. 2. cap. 18.

‡ § 9. of the law above quoted.

It may be doubted here, whether it be the intention of the law, to bind up the hands of a man on deathbed from making any deed, however sound of mind, or however rational the deed may be ; or whether it be only the intention of the law, to infer a presumption, that the deed was done *through trouble of mind, and not deliberately*. Upon the first supposition, the deed is *ipso jure* null, as if done by an infant, or by a man in a delirium. Upon the other supposition, the deed being granted by one who has power of alienation, must be effectual against all the world, except against the heir, who can challenge the deed as done through trouble of mind, and not deliberately.

That the law of deathbed infers only a ground of reduction, will be evident from the following considerations. 1st, That no person is intitled to challenge a deathbed-deed except the heir, is an established rule ; and it is equally established, that the heir is barred from the challenge by the negative prescription of forty years. My next authority is drawn from a case observed by Haddington, 3d December 1608, Gilbert Suppliant. The case was this : A man bedfast with the gout, finding it necessary to sell land for payment of debt, and fearing that people would scruple to deal with him in that condition ; the court, on his supplication, directed some of their number to visit him ; and they reporting, that though he

could not use his limbs, his memory and judgement were entire ; the judges declared, that the alienation to be made by him should not be reducible *ex capite lecti*. This was a singular case, which showed the sense of the court in the strongest manner, that deathbed infers only a presumption of weakness of mind, which must yield to a direct proof of the contrary ; and the proof in this case satisfied all the judges.

It is extremely right, that a man on deathbed, like a minor, or a person fatuous, should be under the protection of the law, to secure him against designing persons, who would lay hold of his weakness to make him do what he would abhor in sound health ; but if this protection were carried so far, as to cut down every deed done on deathbed, without regard to circumstances, it might occasion much wrong, without any substantial good. I instance intermitting diseases, where a man is well and ill by turns, the ague, the gravel, the gout, the asthma, &c. In the course of an ague, a man makes a deed in the intermitting day, in perfect health, and soundness of mind. But the ague wears him out, and he dies unexpectedly within threescore days. He happens not to go to kirk or market ; but in his intermitting days, he goes abroad, is accessible to all the world, and follows out his ordinary occupations, as before he was seized with the disease. It would be unreasonable to forbid a proof
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by unsuspected witnesses, that he was of sound judgement when he made the deed. This reasoning is equally applicable to the other diseases mentioned.

Taking it now for granted, that the law of deathbed infers a presumption only, which may be redargued by a proof to the contrary, the next question is, What proof is sufficient? I observe with satisfaction, that our law is justly suspicious of acts of reconvalence alledged to be done *intra parietes*, offered to be proved by no witnesses but those that are chosen by the grantor, or by those having undue influence over him, all other persons being kept at a distance. Craig * handles this point with accuracy. After observing, that it is only called *lectus ægritudinis* where the disease proves mortal; he lays it down, that if the granter recover so as to go to church, to market, or to other public place, he is held not to have been *in lecto ægritudinis*. But what, says he, if the granter be in such a condition as not to be able to go abroad? He informs us, that some were of opinion, that a proof of the granter's being in sound judgement would support the deed; and adds, that different judgements had been given upon that point in the court of session. He gives his opinion against such a proof; because, says he, where a man

* l. 1. dieg. 13. § 36.

confined to the house makes an irrational deed, it is presumed to have been the effect of undue influence, which men are subject to at the last stage of life, though they may otherwise be *sane mentis*; and that it would be unsafe to trust witnesses who are chosen by the man himself, or by his advisers. This opinion has justly prevailed in our practice: Durie, 1st February 1622, Robertson *contra* Fleming; Durie, 7th January 1724, Shaw *contra* Gray; Durie, penult July 1636, Richardson *contra* Sinclair; Stair, 25th February 1668, Dun *contra* Dun; Marcus, (*Lectus ægritudinis*), February 1683, Daughters of Mounthall. In this last case, it is observed by the Collector, that “equipollent acts are not to be sustained, unless having the essential qualities of being at kirk and market, viz. their being performed before many indifferent witnesses.”

But where acts are done publicly, in presence of unsuspected witnesses, a proof of reconvalence is always admitted. Craig, in the passage above cited, is of that opinion; and that opinion is followed in our practice. The following qualifications to bar a reduction *ex capite lecti* were admitted to proof, viz. That the disposer, several weeks after the disposition, had sitten in his shop, and sold his goods; and that he had walked before his shop-door, and bought a suit of cloaths in the next shop; seeing that, being a Quaker, he did not go to church: Marcus (*Lectus ægritudinis*),
February

February 1683, Livingston *contra* Goodale. The following acts to prove reconvalence, were sustained equivalent to the going to kirk or market, viz. the going from Edinburgh to Inverkeithing to assist at the election of a commissioner to parliament, spending the whole day in a boat at sea for diversion, walking in the Lady Home's garden, and visiting prisoners in the tolbooth; Fountainhall, 21st February 1694, Tillicheuen *contra* Innermaith.

It will illustrate this doctrine, to compare a disposition of moveables upon deathbed, with that of land in the same circumstances. Excepting arms and horses for war, our moveables in ancient times were of very little value; and men were permitted to dispose of them at pleasure. A disposition therefore of moveables on deathbed is sustained: no objection lies against it, except that the granter was not *compos mentis*. A disposition of land on deathbed is very different. It is presumed, that the granter was not of a disposing mind; and reduction follows, unless it can be proved, that he was of sound judgement.

Most of the cases that belong to the law of deathbed, terminate in presumptions that can be redargued by a proof to the contrary. In our old practice, the law of deathbed was frequently applied to cut down deeds granted years before death. This latitude was corrected by act 4. parl.

parl. 1696, barring reduction where a man lives threescore days after the deed challenged, though he neither go to church nor market. The intendment of this statute, is to infer a presumption of reconvalence, if the maker of the deed live sixty days after it. But it admits this presumption to be redargued, by a proof that the man was not found in judgement when he made the deed. Does it not follow from these premises, that though he die within sixty days, yet the deed ought to be sustained, if it can be proved by unsuspected witnesses, that he was of sound judgement when it was made? It would be a strange partiality, to admit a proof for redarguing the presumption of reconvalence, where the grantor lives threescore days; and yet to forbid a proof for redarguing the presumption of the grantor's being unsound in judgement, where he dies within the threescore days. The presumption of reconvalence from going to kirk or market, falls under the same plan of evidence. Lunatics are attacked with fits of delirium at intervals. An irrational deed is made in one of these fits; and when the grantor returns to his senses, he has no memory of what he has done. In his intervals he goes both to kirk and market as usual, but dies within threescore days. The going to kirk or market supports the irrational deed, upon the presumption of reconvalence. It will however not be doubted, that this presumption may be

redargued by an offer to prove, that the man was actually in a delirium when the deed was made.

A singular case of deathbed is a gradual decay of nature from old age, where a man, without any disease, turns weaker and weaker, till the lamp of life be extinguished. This case may be attended with various circumstances. Sometimes the mind wears out before the body, which was the case of the great Duke of Marlborough : they often wear out together. But the most ordinary case is, that the bodily faculties are at the lowest state, while those of the mind are entire, though less vigorous than in the meridian of life. A man in this condition makes a rational deed, and dies within threescore days. It cannot be said, that he was on deathbed ; for it is supposed that he was going about, and attending his affairs, as usual, spending no more time in bed than necessary for the ordinary recruit of sleep. A decay of nature commences commonly years before it end in death : where shall we fix the commencement of deathbed ? But without going nicely or strictly to work, it must be admitted, that a man in the last stage of life, though afflicted with no disease, is more liable to seduction than in vigour of mind ; and upon that account deserves, like a minor at least, to be taken under the protection of law. In this condition, the presumption that he was not of a disposing mind when the deed

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was granted, takes place; to redargue which, a proof to the contrary ought to be admitted. And considering how little influence, in many instances, old age has on the mental faculties, there is not another case, where a proof ought more cheerfully to be admitted by unsuspected witnesses, for redarguing the presumption of weakness of mind. A decay in a young man seldom disables him to go to kirk or market; which will defeat a challenge on deathbed, though he die within sixty days. Now, the going to a kirk or a market, is not, in common sense, so pregnant evidence of the granter's being entire in judgement, as a proof by physicians, surgeons, or other unsuspected witnesses.

The case last mentioned is that of Faichney. He died of old age after a gradual decline, like a lamp after the oil is spent. Nor was his life abridged a moment by any disease. His physician depones, indeed, that he was apprehensive of a palsy; but he was in a mistake, for there was no palsy. Faichney was not beset by any designing persons, to bias him against what he thought right. He was accessible to all the world, none being refused access to him. He went both to church and market; perhaps supported, for the proof of that circumstance is not clear. But his going to kirk and market, is however evidence of his not shunning to show himself publicly. He certainly did not keep at home, in order that there

there might be no witness but of his own chusing. The proof by his physician and surgeon, of his being found in judgement when he granted the deed challenged, is satisfactory. Nor is their evidence redargued by the witnesses who depone, that he looked pale and weakly, like a dying man; because that is frequently the case of the body, when the mind is entire. And lastly, the settlement challenged was a rational and prudent deed, perhaps the most prudent that could be devised by any man in Faichney's circumstances. The deed, notwithstanding, was, in July 1776, reduced, as granted on deathbed. The judges were averse to any argument that might weaken the salutary law of deathbed.

A R T. XXVII.

Original form of a suspension.

IN our present practice, a suspension stays personal execution till it be discussed. But for many years after a suspension was introduced, the effect was different. It contained originally a warrant for citing the creditor to appear in the court of session the fifteenth day after its date, suspending and discharging personal execution for ten days more. If the suspension was not brought into court within that time, personal execution proceeded. In that view, when a suspension was obtained in vacation, or at the end of a session, the warrant was granted for citing the creditor to the first day of the following term, suspending and discharging personal execution for ten days more, as in the other case.

A R T.

A R T. XXVIII.

Res judicata.

IT belongs to the legislature to announce what is right and wrong ; what ought to be done, and what ought not to be done : and the acts of the legislature bind every member of the state. The power of courts of law, is far from being so extensive. A judge can declare what is right and wrong, in every process brought before him. His opinion so far makes law ; but in every other respect, it is no better than the opinion of a private person. Hence the maxim in the Roman law, *Res inter alios judicata, aliis nec obest nec prodest*. This maxim shall be illustrated in various cases.

I begin with a decree-condemnatory. This decree, as observed, makes law between the litigants, both as to relevancy and proof ; but has no authority in a new process, not even between the same parties. A proof by witnesses is complete evidence in the process where it is taken ; but in no other process. Thus, a decree holding the defendant confessed on the passive titles, was not sustained as probative of the passive titles in another process against him, though
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the same person was pursuer in both processes *.

But though at common law, a proof in a process-condemnatory, is not held *pro veritate* in any other process; yet, for the ease of the witnesses and for saving expence, the court of session, as a court of equity, permits the proof to be transmitted into a new process, and to be founded on *per modum probationis*; provided the new process be between the same parties; but with liberty to the defendant to move every objection against the depositions, that would be relevant against the witnesses, were they called into court to depone a second time. A sentence of banishment in a criminal trial at the instance of a private party, with concurrence of the King's Advocate, having been pronounced in the court of justiciary against a criminal, upon a clear proof of theft and robbery; the proof, by authority of the court of session, was transmitted into a new process between the same parties, for reparation and damages †. And it being objected, That a witness who had deposed in the court of justiciary was rendered infamous after emitting his deposition, the objection was sustained to render it invalid ‡. For as, in strict law, no proof is sustained but what is taken in presence of the judge,

* Durie, 20th November 1629, *Lundie contra Lundie*.

† January 1731, *Bunten contra Buchanan*.

‡ 19th December 1737, *inter eosdem*.

equity will not relax so far from this rule, as to give faith to a deposition when the witness himself would not be listened to. In the same manner, a process of count and reckoning, which had depended before arbiters but without a final sentence, being brought before the court of session, a proof taken in the submission was admitted as evidence; reserving all objections against the same, and reserving also to both parties a re-examination of the witnesses that were alive. They were also allowed to bring an additional proof, if necessary *.

But such a proof is not commonly sustained in a new process, where either the pursuer or defendant is different. And accordingly it is a rule, That a proof by witnesses of the passive title *gestio pro herede*, or vicious intromission, is not evidence in another process at the instance of a different pursuer. Yet the transmission of depositions in this case, seems no less rational than where both pursuer and defendant are the same. For if the pursuer be satisfied to join issue upon depositions taken in a process where he was not a party, the defendant, who was a party, ought to have no objection; provided he be allowed to object against the depositions, as against the witnesses themselves. And from a case reported

* 15th December 1733, Captain Chalmers *contra* Sir James Cuningham.

by Lord Stair *, it appears, that this had been frequently practised. But the practice ought not to be indulged, where the defendant is different: it would be too wide a stretch, to sustain depositions against a party who had no opportunity to put cross interrogatories to the witnesses. Thus, a decree proving the tenor of a bond against one of the obligants, being produced as proof in a process of proving the tenor against the other obligant, the pursuer was not permitted to found upon his decree as evidence; which obliged him to take a new proof †.

I observe with regret, that the court has not always been so chaste. In a train of decisions it has been found, that where the superior's right is reduced, the decree is *res judicata* against his vassals, though not made parties in the process. And that a decreet of reduction of a tack, is equally *res judicata* against subtenants ‡. Where a tacksmen removes after his tack expires, whether voluntarily, or by a decree of removing, his subtenants, who can have no pretext to continue possession, may be removed at short hand. But supposing a tack to be reduced at the instance of

* 13th January 1675, Glendinning *contra* Earl Nithsdale.

† Newbyth, 1st February 1665, Broomhall *contra* Marquis of Douglas; Stair; Dirleton, 13th January 1675, Glendinning *contra* Earl Nithsdale.

‡ See Dict. of Dec. *Res inter alios*, sect. *Res judicata*.

the landlord upon fraud or other ground of reduction, *Queritur*, Can subtenants be removed at short hand? If the tacksmen had no power to sublet, they may be so removed; because they have no right to continue possession of another man's property against his will. But if the tacksmen had a power to sublet, they cannot be so removed: they have a title to possess derived from the landlord himself. The judgement against the tacksmen is *res inter alios* as to them. There must therefore be a new process against the subtenants; in which they will be admitted to support the tacksmen's right, notwithstanding the *res judicata* against him. And in this particular, subvassals are precisely similar to subtenants. Upon redemption of a wadset, the wadsetter's tenants, and also his feuers, may be removed *brevi manu* at the next term. But supposing, that a man in possession upon a title of property, has created feus, or other subaltern rights; a reduction of his right by a person producing what appears to be a preferable title, will not intitle that person to turn out *brevi manu* those who have subaltern rights. A process is necessary against them, in which they will be admitted to support the right of their author. But is a reduction of the author's right effectual against a purchaser, who has only a disposition, or a minute of sale? The doubt is, that a subtenant or subvassal in possession is known, and may be made a party in the reduc-

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tion ; which is not the case of a disponee without infeftment. But even here the maxim stands good, That a *res judicata* cannot affect third parties. Nor is there any hardship : for the reducer, by taking infeftment, acquires the civil possession of the land ; which will force the disponee to become pursuer, if he have any prospect to support his author's right.

A decree against the principal debtor, was of old held to be *res judicata* against the cautioner ; as if *res judicata* were effectual against all the world, like an act of parliament. But that opinion wore away ; and at present it is established, that a decree against the principal debtor, is not *res judicata* against the cautioner, either as to relevancy or proof *.

Next in order come the effects of a decret-abolvitor ; first, with respect to a new process between the same parties ; and, next, where the pursuer or defendant is different. With respect to a new process between the same parties, an absolvitor from defect of proof, must be distinguished from an absolvitor from defect of relevancy. Where the pursuer fails in proving, it was a rule in the Roman law, That he is not permitted to renew the action, even on production of a writ *noviter veniens ad notitiam* †. This

* Forbes, 28th December 1709, Hamilton *contra* Calder.

† l. 35. *De re judicata*.

rule is evidently a remnant of the old law, which held a decree to be equivalent to a decret-arbitral, or a transaction *de re dubia*, putting a final end to the claim. But as a decree in our present practice depends on the authority of the judge, his authority is confined to the evidence produced in the process; and therefore cannot bar a new production upon which the judge had no opportunity to give an opinion. For that reason, the court, in a new process having the same conclusion, admit writs *noviter venientia ad notitiam* *. The same reason, it is true, would admit a new proof by witnesses: but a more weighty reason on the opposite side excludes such a proof, viz. the danger of subornation and perjury. Such a proof is not permitted even in the same process, except in very favourable circumstances †. As there is not the same danger, where the facts offered to be proved are different from what were formerly the subject of proof, the court frequently gives way to a proof of such facts in the same process ‡. But I know no example of admitting such proof in a new process.

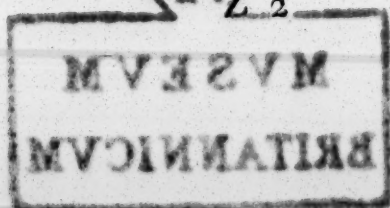
We proceed to an absolutor from a process as irrelevant. Such absolutor will not bar a new process between the same parties, inferring the

* Stair, 22d June 1681, Paton *contra* Stirling.

† See Dictionary, *Process*, sect. *Incident diligence*.

‡ Dictionary, *Process*, sect. *Competent and omitted*.

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same conclusion from a different medium. Thus, in a reduction of a disposition on the act 1621, the defence was, That an absolvitor had formerly been pronounced against the pursuer in a process for reducing the disposition on the head of inhibition; and that it would make law-suits endless to admit a new ground of reduction. The court was of opinion, that *competent and omitted* bars only the defendant, not the pursuer, against whom no suspicion lies of willingly protracting his cause; and therefore, that a pursuer may insist upon any new ground of law that was omitted in a former process *. This opinion is clearly founded on the doctrine above laid down: *res judicata* has no authority except with respect to the points determined; for so far only did the judge interpose his authority.

If the conclusion be also different, there can be no reason for sustaining the *exceptio rei judicate*. “ Si quis interdicto egerit de possessione, “ postea in rem agens, non repellitur per exceptionem; quoniam in interdicto, possessio, in “ actione, proprietas vertitur †.”

Having discussed a new process having the same conclusion, but upon a different medium, and also a new process with a different conclusion; there remains only a third variety;

* Fountainhall, 27th December 1692, Kinloch *contra* Oliphant.

† l. 14. § 3. De except. rei jud.

which



which is, that the new process is the same with the former, except as to the pursuer's title. Take the following example. Being served heir in general to my father and subjected to all his debts, I bring a reduction, on the head of fraud and circumvention, of an heritable bond granted by him; and an absolvitor goes against me for want of sufficient proof. I afterward complete my right by infeftment to the land upon which the heritable bond is secured: and in order to disburden my estate of the bond, I bring a fresh reduction, upon the same medium, but without offering any additional proof, either by writ or witnesses. Will the *exceptio rei judicate* be sustained against me? The present process is founded on my right of property; my former, upon my right to be relieved from payment of an unjust debt; and therefore, in strict law, the exception militates not. But upon the principle of expediency it ought to be sustained: a regular sentence stands against me, finding there is no evidence of the fraud and circumvention. I have no reason to expect an alteration; and I ought not to distress my party by a new process, when I have no rational prospect of success.

So much where the process is between the same parties. What remains is the effect of an absolvitor, where the new process is carried on by a different pursuer, or against a different defendant. I consider not representatives to be different persons:

fons: an *exceptio rei judicate*, if available against the pursuer himself, must be equally so against his representatives. I can think but of one exception; and that is, where the decree is founded on a circumstance personal to the pursuer or to the defendant. For example, if the absolvitor proceed upon a promise made by the pursuer, that he himself shall not demand payment, the *exceptio rei judicate* will not bar his representatives. And if the absolvitor proceed on a promise made to the defendant, that the sum shall not be demanded while he is alive, the *exceptio rei judicate* will not benefit his heirs or cautioners.

Instances are not rare, of a process being renewed by others than the pursuer of the first process, or his representatives. Against such the *exceptio rei judicate* will not operate; because, as observed above, the opinion of a judge makes law between the litigants only, and their heirs. Thus, in a suit upon the passive titles by a creditor of the predecessor against his representatives, an absolvitor will not bar another creditor insisting in a process of the same kind. Nor will an absolvitor in a process of usury by a private party, bar the King's Advocate insisting *ad vindictam publicam* *.

* Durie, 8th March 1623, King's Advocate *contra* Morison.

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Though from the nature of a process, the *exceptio rei judicate* cannot operate in a process of the same kind carried on by a different pursuer; it deserves consideration, whether, in some cases, it ought not to operate in equity. I give, for example, a reduction on the head of deathbed, in which an absolvitor goes against the heir-apparent, who is the pursuer. After his death, the same process is competent at the instance of the heir-apparent next in order; and as he represents not the former pursuer, the absolvitor will not avail against him. And though the disponent prevail also in this process, yet he lies open to new processes while any person remains who can claim as heir to the disponent. One thing is evident, that in this reduction there can lie no suspicion of collusion to bar an equitable remedy; for it cannot be the intention of the heir who brings the reduction, to secure the disponent by a simulate process, when he can secure him openly by a ratification, without needing to put on a mask. Two reasons concur in equity to support the *exceptio rei judicate* against every subsequent heir. First, the hazard of bribery and perjury, where the same facts are admitted to probation a second time; and, next, the insupportable hardship of subjecting the disponent to reductions without end.

An absolvitor in a process of irritancy carried on against a tenant in tail by the immediate substitute,

stitute, will not, after that substitute's death, bar a new process upon the same facts carried on by the substitute next in order. The new process is not barred at common law, because an absolver has no effect but against the parties engaged in the process; nor is it barred in equity, because the former process may have been collusive. This is one of many hardships that a tenant in tail is subjected to.

The defendant, in a reduction upon either of the bankrupt statutes, is in a still worse condition. Any one creditor may bring a reduction of an alienation made by the debtor, on the medium of his insolvency; and an absolver against one creditor, avails not against any other. Against this hardship, which may be intolerable, law knows no remedy.

In a former article *, mention is made of actions founded on personal privileges, such as, a reduction on the head of deathbed, on that of minority and lesion, on interdiction, &c.; and it is there observed, that if the privileged person refuse to insist, a court of equity will authorise his creditors to insist in his name. And now, with respect to an absolver in such a process, I inquire whether an action of that kind ought to be sustained to every single creditor, or whether it be necessary that all who are known must join in

* Article 21.

the process. To sustain action at the instance of a single creditor, may subject the defendant to an action at the instance of every creditor; which a court of equity will never countenance. Therefore, to secure the defendant as much as possible, without forfeiting the creditors, the court may justly refuse to sustain the action, till all the creditors be advertised edictally, to concur. And if an absolvitor be obtained, the *exceptio rei judicatae* ought to be sustained even against those who did not concur.

If the next in kin, instead of confirming, take out a licence to pursue, and upon that title insist in a process against a party supposed to be debtor to the deceased; will an absolvitor in that process secure the defendant, when the pursuer dies without confirmation? It will not: the debt lies still open to be confirmed by the succeeding next in kin; and against him the absolvitor does not operate. The commissaries therefore ought to avoid giving a licence, if the circumstances be not highly favourable. It is hard indeed to oblige the pursuer to confirm a doubtful claim, which, after an expensive process, may produce nothing: on the other hand, it is no less hard to oblige a man, contrary to common law, to sustain a process where he cannot have the benefit of a *res judicata*.

Hitherto the effects of a standing decree have been under consideration. But a decree may

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be reversed, in a reduction, or upon an appeal, after having received execution in whole or in part; and we now proceed to examine, how far such execution ought to be supported against the reversal. Some decrees proceeding on errors in fact or in law, are voided as unjust. Some, in themselves just, are voided by means of facts afterward discovered. I need scarce add decrees that are voided as *ultra vires*: when a judge transgresses his powers, he is no better than a private person.

With respect to a decree erroneous in law, a judge has legal authority to determine controversies regularly brought before him. But his opinion is not, like that of an arbiter, the determining rule: he is tied down to make law his rule. And therefore, if the decree he pronounces be not founded on law, it is void, as destitute of legal authority. Every decree, it is true, is presumed to be according to law; but the presumption flies off, if the decree be reversed in a superior court. I put the case, that a certain subject, the property of which is controverted, is decreed to belong to the pursuer, who, accordingly, is put in possession by execution on the decree. The decree is reversed in a superior court, as erroneous in law: is the property transferred, yea, or no? The answer is, that a judge cannot transfer property without a just cause. The superior court pronounces, that the property

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ty belongs not to the pursuer, but to the defendant. And accordingly, we find not in the law of any civilized country, that an unjust decree is one of the modes of transferring property.

To illustrate this doctrine, figure a settlement of a land-estate upon a long series of heirs, and a controversy between John and James about the succession, after the death of a predecessor who left no issue. James being preferred by the court of session, is served and infeft; and aliens the estate for a valuable consideration. The decree is reversed in the House of Lords, and John is found to be the righteous heir. According to that judgement, the service and infeftment of James are void; and the alienation made by him is also void, as proceeding *a non habente potestatem*. The subject consequently remains *in hereditate jacente* of the predecessor; and John may take possession, by making up a title as heir. All that James gains by the decree of the court of session, is to be a *bona fide possessor, qui fructus perceptos et consumptos facit suos*.

Money is singular: the property of it is transferred by possession, not even excepting robbery. The person however who has unjustly acquired the property of money, is bound to pay the equivalent; and a decree erroneous in law, will afford no protection; witness the case of payment made to a putative creditor, by authority of a decree. The decree will protect the debtor from

the true creditor ; but will it also protect the putative creditor who has received the money ? No. The putative creditor holds the sum *sine justa causa* ; and he is bound in conscience to pay it to the true creditor ; and that payment sets all to rights.

Supposing now a decree to be affirmed, instead of being reversed, it is effectual from its date, as if it never had been challenged. One exception there is, which merits attention. A parish-minister is deposed by the presbytery ; and the sentence is affirmed by the synod and general assembly. He undoubtedly stands deposed from the date of the presbytery's sentence ; but must he restore the stipend bestowed by him on his process, and on maintenance of his family ? He cannot urge a *bona fide* possession after the first sentence ; and he has no defence at common law. Upon these grounds it once was found, that the sentence of the assembly operates *retro* to the date of the sentence affirmed, which bars the minister from the stipend falling due in the interim *. But this judgement seems to rest upon common law, contrary to equity : while a minister expects to have the sentence reversed, it would be rigorous to deprive him of the only fund he has for prosecuting the appeal, not to talk of subsistence to himself and family. Equity therefore continues him in possession of the stipend, till the sentence be affirmed in the last resort. And if he

* July 1723, Muir *contra* Hepburn.

be litigious, he may be subjected to the expence of the process. Here then is a case, where the ultimate sentence only is effectual, though the first sentence be just. And this must always happen, where the subject in controversy is alimentary, such as the stipend of a minister.

The other branch of unjust decrees is, where they are founded upon an error in fact. All controversies that can be brought before a court of justice, arise from facts; and if judgement be given upon an error in fact, it is set aside as not being a judgement upon the case in controversy.

We proceed now to the other kind of decrees, which, though not unjust, are rendered ineffectual by facts afterward discovered. The following case is a proper example. The estate of Balquhain was possessed many years under a strict entail. Upon the death of Ernest Lesly without issue, a competition arose between Sir James Lesly and Count Antonius Lesly, a German; each claiming to be served as next heir of entail. Count Antonius was preferred by judgement of the court of session, affirmed in the last resort, finding him to be the next heir of entail in terms of the settlement. Having completed his title to the estate by service and investment, he continued in possession several years, as undoubted proprietor. At last Peter Lesly-Grant entered the lists as next substitute to Count Antonius, insisting in a reduction of the Count's right, as
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being an alien, and therefore incapable to inherit land in Britain. The pursuer prevailed in his reduction before the court of session; and this judgement was affirmed in the House of Lords.

The judgement preferring Count Antonius before Sir James, lay not open to any challenge. But it was rendered ineffectual by the later judgement finding Count Antonius an alien. Nor are the two judgements inconsistent with each other; their import in conjunction being, that Count Antonius was next heir of entail, but that he was personally disqualified. Thus standing the case, the question is, Whether the estate of Balquhain was transferred to Count Antonius by his infestment proceeding on the first judgement? or, Whether the judgement was null and void, with all its consequences, being in favour of an alien? Supposing the former, all acts done by him preceding Lesly-Grant's challenge, must be effectual: supposing the latter, these acts are void, as flowing *a non habente potestatem*. In order to resolve this intricate question, we assume a proposition that will not be controverted; which is, That a judgement cannot operate beyond the intention of the judge, more than a covenant beyond the intention of the contractors. Now, no more was decreed, nor intended to be decreed, but that Count Antonius was called to the succession before Sir James Lesly;

ly; and the objection of alienage remained entire. Hence it is evident, that Count Antonius was only a putative proprietor, never really vested in the estate. Suppose the Count, without opposition, to have been infeft as heir of entail, this infeftment could not transfer the property to him, an alien; and the opposition he met with, could not supply the defect of his right.

To conclude, when a just decree is rendered ineffectual by facts afterward discovered, every consequent act must be equally ineffectual. Thus, in the instance given, the judgement finding Count Antonius next heir of entail being rendered ineffectual by his alienage, the consequent service and infeftment were equally so. A service in such a case confers no right; and it is an established maxim, That a title without right is of no significancy.

As to the effect of a foreign decree, see Principles of Equity, book 3. ch. 8.

ART.

A R T. XXIX.

Mutual relief among co-obligants.

DEbtors bound together, whether as co-principals or as co-cautioners, are held by law to be, as in a society, bound to act for the common behoof; and consequently that every right relative to the common bond, must accrue to the whole, though purchased by one of them in his own name.

Hence it is, that a cautioner paying the debt, and taking assignment to himself, is not at liberty to lay aside his character of cautioner, in order to put himself in the creditor's place. The assignment accretes to the whole cautioners, and cannot be extended farther than the claim of relief would go without it.

Hence, also, a cautioner demanding relief must communicate eases: which is saying only, that he can claim no more from his co-cautioners but what he has paid ultimately above his proportion of the debt.

Suppose six *correi debendi*, or co-obligants. If one pay the debt, and take an assignment, what method is he to follow for operating his relief? Can he, in virtue of his assignment, claim the whole from any one of his co-obligants, subtract-

ing only his own share? Or must he be contented with a sixth part from each co-obligant; reserving action for a further demand, in case any of them prove insolvent? The first is, in effect, giving to the assignee the benefit of the assignment, to draw more than he would be intitled to by an action of relief; which is contrary to the equality that ought to be preserved among co-obligants. The other is not less unequal on the other side; for the obligant who has been compelled to pay the whole debt, is in a worse condition than the other co-obligants, each of whom advances the sixth part only.

The rule therefore ought to be, That every single obligant must bear an equal proportion with the assignee. For example, Six cautioners are bound in a bond for L. 600; A, paying the debt, ought to be relieved of the one half by B; and each of them is intitled to draw L. 100 from C; which puts the three upon an equal footing; and so on, till each of the six be brought in for his share. Now, as this produces a perfect equality among the co-cautioners, it avoids, at the same time, an after reckoning, in case of insolvency.

But what if the cautioner who takes an assignment upon paying the debt, be laid under the necessity of adjudging the estates of such of his co-cautioners as happen to be insolvent. I see not that this varies the case. He may attack any of his co-cautioners, and draw out of his effects the

one half of the sum contained in the adjudication, And having recovered that sum, he must communicate his adjudication to the competing creditors ; so as that he and they may recover from the other co-cautioners what remains of the debt. I think indeed, that the cautioner-assignee may adjudge for the whole debt, without subtracting even his own share ; because it is a benefit to the solvent creditors to have the adjudication as extensive as possible, in order to draw the greater sum in competition with the other creditors of such of the cautioners as happen to be insolvent.

ART.

A R T. XXX.

Heir entering *cum beneficio inventarii*.

FEW branches of our law have made a slower progress toward perfection, than that concerning heirs entering by an inventory; and yet no branch deserves more the attention of the court of session, considering what influence it has on payment of debts, and circulation of money, matters of great importance in a commercial country.

In order to improve our law in this particular, it is necessary to state the articles that require rectification. I begin with the hardship that the creditors lie under. The creditors, it is true, can bring the estate to a sale, a salutary regulation authorised in the later practice of the court of session. But then, it is in the power of every heir who takes the benefit of an inventory, to deprive the creditors of that privilege. If before a process of sale be raised, the heir enter into payment of his predecessor's debts, the other creditors are barred from a process of sale; for after paying the value, or any part of the value, the estate cannot be wrested from the heir.

2do, As it is admitted, that the heir may legally pay *primo venienti*, favourite creditors will

be preferred, or such as give the largest composition. A power so arbitrary, which opens a wide door to injustice, and even to fraud, is a reproach to the law of a civilized country. And yet the court of session, far from repressing the evil, have countenanced it; finding, that an heir *cum inventario*, may not only pay *primo venienti*, but may also prefer what creditors he pleases, by granting heritable bonds of corroboration. Nay, farther, if the creditors allow a year to elapse, there is nothing to bar the heir from aliening the whole estate, which effectually prevents a sale at their instance.

3tio, It may readily happen, that a personal action for payment is carried on against the heir by one creditor, and a sale of the land by another. What shall be done in that case? Both actions cannot proceed; and yet no rule appears for giving a preference to either. A favourite creditor will never be wanting to carry on the personal action, with a view to serve the heir, in contradiction to all the other creditors.

As our law stands at present, the heir is also subjected to many hardships. If, apprehending the debts to exceed or equal the value of the estate, he make no opposition to a sale at their instance, the whole may soon be brought to a fair conclusion. The price is divided among the creditors; and the surplus, if any, goes to the heir.

But if all the debts that he can discover do not exceed the value of the estate, his affection for his paternal inheritance makes him pay the whole, fearing no further disturbance. I see not however, that the possession of the estate is secured to him. A new creditor starting up any time within forty years, can relevantly alledge, that the debts paid amount not to the value of the estate. This brings on an intricate, tedious, and expensive law-suit; and the decree, supposing it to be in favour of the heir, protects him not against the same distressing course with other creditors who afterward appear; for they are not bound by a judgement to which they were not parties. And so the heir lies open to perpetual harassment, without prospect of an end.

In these unhappy circumstances, the heir's hands are effectually tied up from making any improvements. For it is a rule established by the court, That the heir must account to creditors according to the present value of the inventory.

Luckily, a remedy to these evils falls under the *nobile officium* of the court; and our judges cannot be more usefully employed than in establishing a proper remedy. In that view, the following hints are suggested to be corrected or improved.

1. That within a month after the inventory is recorded in the books of session, advertisements must

must be put in the news-papers, calling the creditors to produce their grounds of debt within six months, in the hands of the keeper of the said record; of which a list shall be made, subscribed by the keeper and witnesses.

2. That the heir shall have forty days for examining the lists and vouchers, in order finally to resolve, either to abandon the estate to the creditors, or to hold the estate and subject himself to the claims contained in the list. And till that term be elapsed, the creditors shall be barred from doing any diligence.

3. If the heir suffer the forty days to elapse, without declaring his resolution as aforesaid, the creditors are empowered forthwith to bring the estate to a sale, as a bankrupt-estate; the price to be divided among the creditors, the surplus to the heir, if there be any surplus.

4. If the heir come to a resolution to hold the estate, he must, before commencement of a process of sale, deliver to the keeper a formal deed, binding himself to pay all the claims contained in the list; reserving to him, as to any other heir, objections and defences that may be competent against particular claims.

5. In that case, he shall be intitled to apply to the court of session, praying, that the just value of the lands and other subjects contained in the inventory, be ascertained by a proof. And the value thus ascertained by the court shall be held

held the just value, to bind the heir, and all the creditors who may afterward appear.

6. After the value is thus ascertained, and the objections and defences against particular claims are discussed; the court, upon a second application by the heir, shall take inspection of the claims sustained. If these be found to equal the ascertained value of the inventory, the heir shall be declared free from being further liable to any debts or deeds of his predecessors. If they fall short of the ascertained value, the balance, with its interest, shall be declared a sum in the hands of the heir, ready for creditors who may afterward appear.

7. If the heir neglect to apply to the court for ascertaining the value as aforesaid, he shall be bound to account to the creditors who afterward appear, for the subjects inventoried according to the value at the time of the demand. When this value is ascertained by a proof, and from it is subtracted the sums paid to the creditors who appeared in due time, the remainder shall be a fund in the hands of the heir, for satisfying the present creditors; and if there be a surplus, it shall remain for other creditors who may afterward appear, or who have appeared after the six months allowed to creditors to produce their grounds of debt in the keeper's hands.

8. If the heir, without signifying his resolution of keeping or abandoning the estate, shall dispose
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of it, or of any part, he shall be subjected universally, as if he had entered without inventory. And justly ; because he has prevented the creditors from bringing the estate to a sale.

A R T.

A R T. XXXI.

Rules for ranking creditors and disponees on a bankrupt estate.

Early in life some of my leisure-hours were employed to frame essays on particular heads of Scotch law ; and these essays, intended for private use merely, found however their way into the public. Against frequent solicitations, I resolved, that that juvenile performance should never again see the light ; being sensible, that in a young author imperfections are pardoned, which will not be indulged in later editions, when the excuse of youth no longer subsists. At the same time, I thought it would be serving the public better, to incorporate in my later works the substance of these essays. The substance accordingly of the essay termed *Beneficium cedendarum actionum*, is taken into *Principles of Equity* ; the essay on Prescription, enlarged and improved, makes a chapter in the present work ; and I have here added the essays *Vinco vincentem* and *Jus tertii*, without any material alteration, but of a neater form. It was indeed proper, that these technical titles should be converted into others more expressive of the subject. The first I term

“ Rules for ranking creditors and disponees on

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“ a bankrupt estate ;” I term the other, “ What interest is sufficient to intitle one to sue or to defend.”

In a competition among rights burdening land, priority of time determines the preference. A land-proprietor who burdens his land with an heritable bond completed by infeftment, yields preference to the creditor in a competition about the rents. And as he himself is postponed to the creditor, every subsequent right he grants must equally be postponed. For the same reason, where the estate is sold, the infeftment of annual-rent is preferable on the price, as formerly on the land. Hence in a competition among real rights, the rule is, *Prior tempore, potior jure*.

Certain objections, or grounds of reduction, disturb the operation of this rule, by setting aside a prior creditor in competition with one posterior ; an inhibition, for example, a consent by one creditor to the preference of another, and many others that occur in rankings.

No rule is more easy in its application, than that of ranking real debts according to their dates. But it is not always easy to determine the effect of objections, or grounds of reduction. The way is, to begin with computing what each should draw by the general rule, *Prior tempore, potior jure* ; and this will be the ultimate draught of the creditors who are not subjected to any objection or ground of reduction. Proceed next

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to consider what a posterior creditor is intitled to draw from a prior, against whose right he has an objection or ground of reduction. As every relevant ground of reduction is, in a competition, considered as equivalent to a decree of reduction; the prior creditor may be laid aside, as supposed to be cut down by a decree of reduction; and whatever sum the posterior creditor would draw out of the common fund upon that supposition, he is intitled to demand from the prior creditor: there is no reason for confining him to a less sum; and he can have no pretext for demanding more. This operation requires to be explained; and the best explanation will be examples. Let three real creditors be supposed in the order of time, John, James, and William. William lent his money upon a consent from John to his preference. The fund is 6, each of the debts 4. Ranking the three creditors according to the order of time, which is the first step, John draws 4, James the remaining 2, and nothing is left to William. We then proceed to consider the effect of John's consent to William's preference; which imports no more but that John shall make no opposition to William, leaving him to draw as if he John were not in the field. To give the consent any further effect, would make it the same with a conveyance of John's claim to William; which is not the intendment of a naked consent to a preference.

Laying then John aside, William can draw but 2; because James, as prior in time, excludes him from the other 4; and this sum of 2, William is intitled to draw from John. The result of the whole is, that John draws 2, James 2, and William 2. I state another case. Suppose the fund to be 8, and each of the debts 6. By the rule of time, John draws 6, and James the remaining 2, leaving nothing to William. Taking next the consent under consideration, William can draw but 2, because James covers from him the other 6 by the rule of time; and that sum he draws from John. The result is, that John draws 4, James 2, and William 2. Cases may be figured where consent has the same effect with a conveyance. The fund is 12: each of the debts 6. By the rule of time, William draws nothing; but by laying John aside, he will draw 6; and that sum he takes from John. In this case, William draws from John all that John is intitled to by the rule of time. But this proceeds from the proportion of figures, not from the nature of consent. On the other hand, cases may be figured, where the consent has no effect; as where James covers the whole fund from William. In that case, William has nothing to draw from John; because he would draw nothing, supposing John to be out of the field.

The double ranking may be avoided, by laying John, the consenter, aside, in computing what William,

William, the person consented to, is intitled to draw; and his draught will always be what is left of the fund by the preferable creditors. Thus, in the first example, James being preferable to William for his whole debt, the remainder, which is only 2, falls to William's share. The following illustration will make this method clear. William, proposing to lend his money on heritable security, finds the subject preoccupied by two real creditors, John and James. The former, in order to accommodate the proprietor, his relation, is willing to give preference to William; who, upon that condition, lends his money, and obtains an infeftment of annualrent. According to this transaction, what remains of the fund unoccupied by James, is all that William has to depend on for his payment; and the price of that remainder he is intitled to draw as far as his debt extends.

The same method holds, where, instead of a consent, William has an inhibition that strikes out John's debt. The inhibition, like consent, has only the effect of giving a preference; and puts not the inhibitor in place of the person inhibited, which would require an assignment. James, in all events, is preferable to William, because William's inhibition strikes not against him: William can draw nothing but what remains unoccupied by James; and that remainder he draws from John; or, by the more simple method,

method, he draws it directly out of the price of the land.

The same method is equally applicable to every ground of reduction, that affords a preference only, and is not equivalent to an assignment. I give an example from the Roman law. By that law, a conventional hypothec recorded, is preferred before one not recorded; but a legal hypothec requires not to be recorded. One borrows a sum upon a hypothec, which the creditor neglects to put on record. The debtor afterward is made a tutor; and by the Roman law, all his effects are hypothecated to the pupil. Last of all, he borrows another sum upon a hypothec, which is put on record. According to the rule of time, the claims must be ranked in the order here mentioned. But what disturbs this order, is the law preferring a conventional hypothec recorded before one not recorded; which intitles the former to draw as if the latter were not in the field. And this case accordingly is similar to those above mentioned, where a posterior real creditor is preferred before a prior, by consent or by inhibition.

Thus stands the law where the ground of reduction operates a total preference. Next in order are cases where it operates only a partial preference, as in adjudications within year and day. John, for example, is an adjudger infest; James has an heritable bond and infestment of a later

date;

date; after whom comes William, a second adjudger within year and day of the first. All that William has to depend on, is what remains of the fund after James obtains payment. As to that remainder, he is ranked *pari passu* with John; which comes to the same with preferring him before John as to the half of the remainder. John, the first adjudger, is preferred before James, the annualrenter; and James before William, the second adjudger; both by priority of time. William, by act 1661, is preferred before John for half of the remainder; and that half he draws, as if John were not in the field. Suppose the fund to be 6, and each of the debts 4. John draws 4, in competition with James, leaving the remaining 2 to James, which he retains ultimately. William can never draw more than 2, the rest of the fund being preoccupied by James; for the half of which William is preferred before John. Upon the whole, John draws 3, James 2, and William 1. Here it is taken for granted, that the act 1661 does not intitle the second adjudger to draw as much as the first; but only that it bars the preference given by common law to the first adjudger. See another example of the same kind at the close of the 36th article.

Having laid down the method of determining what a posterior creditor ought to draw from a prior, by virtue of a ground of reduction, partial

tial or total ; my next care shall be, to render the subject familiar, by adding other examples. John is an annual renter, first in time ; after him come James and William, adjudgers *pari passu*. William lent his money, trusting to a consent obtained from John ; but after an inhibition by James. The fund is 6 : each of the debts 4. By the general rule, *Prior tempore*, John draws 4 ; James and William each of them 1. Considering next the grounds of reduction, James, by his inhibition, strikes William out of the field ; and draws all that is left by John, which is 2 ; and that sum he retains ultimately. William, by John's consent, strikes him out of the field : all however that he can draw after yielding preference to James the inhibitor, is 2. Upon the ultimate division, each of the competitors draws 2. Supposing the fund to be 6, as before, and each of the debts to be 5 ; John draws 4, James 1, and William 1. Supposing the fund to continue 6, and each of the debts to be 6 ; John draws the whole. I intreat the reader's peculiar attention to the following example. First, an assignment duly intimated ; second, an arrestment intervening between the assignment and intimation ; third, an adjudication proceeding upon a citation, posterior in date to the assignment, but prior to the arrestment. The subject is land-rent ; and the parties are all convened in a multiple-poinding. The arrestment is preferable to the assign-

ment *. The assignment is preferable to the adjudication †. And the adjudication is preferable to the arrestment ‡. Here priority of time is the ground of preference in all : which is a contradiction ; for if A be preferred before B upon any ground, B cannot be preferred before A upon the same ground. The circles that have hitherto occurred, proceed upon different grounds of preference ; and there is nothing more simple, than that A should be preferred before B upon one ground, and B before A on another. But in the case given, there must lurk somewhere a fundamental error ; for to prefer a number of persons in a circle upon the same ground, is a flat contradiction. Nor is it difficult to discover the error : in preferring the arrestment before the assignment, the arrestment is supposed to make a *nexus realis* on the subject ; which an assignment, without intimation, certainly does not : in preferring the adjudication before the arrestment, an arrestment is held to be simply a personal prohibition ; for if it made a *nexus realis*, it ought to be preferred before the adjudication. If either supposition be adopted, the ranking will be easily adjusted. If an arrestment make a *nexus realis*, it is preferable before both the assignment and de-

* Stair, tit. Assignment, sect. 44.

† Durie, 2d March 1637, Smith *contra* Hepburn.

‡ Forbes, 26th June 1705, Stewart *contra* Stewart.

creet of adjudication : if it be a personal prohibition only, both are preferred before it. And that the purpose of an arrestment is only to prohibit the arrestee from making payment to the common debtor, will be evident, first, from the tenor of the writ ; next, from its giving way to a poinding of the goods arrested ; and, last, from its giving way to a posterior adjudication.

Having discussed the ranking of creditors, we proceed to that of different disponees, each claiming the property. Among disponees, as among creditors, the general rule of ranking from priority of time takes place ; and there may be grounds of reduction, by which a posterior disponee prevails over one that is prior. There is no difference, but that a disponee claims the subject itself, upon which a creditor has only a security. And when the claim of a creditor is so great as to cover the whole subject, even that distinction vanishes. The foregoing method therefore of determining the effect of grounds of reduction between creditors, is equally applicable to disponees. Take the following examples ; in which the competing rights shall be stated in the order of time, to save the embarrassment of many words.

Example 1. A deathbed - deed completed, but reducible by the heir. A second deathbed-deed of the same subject, consented to by the heir. The first deed excludes the second : the
second

second excludes the heir : and the heir excludes the first. In determining this competition, I take it for granted, that the heir's consent to the second deed, operates not a conveyance of his privilege, but barely a *non repugnantia*. Upon that supposition, the first disponent prevails. The heir may be laid aside as having no interest in the question ; for in no event can he draw a shilling by his reduction. This case is singular, a consent intended to benefit one, benefiting an antagonist without intention. But though singular, it is not sole : the following is of the same kind. A base infeftment of ward-lands. A second infeftment of the same made public by the superior's confirmation. The first infeftment will prevail by means of the superior's consent, though intended to benefit the other infeftment ; because the superior, by that consent, has now no interest to insist in a declarator of recognition against the first infeftment.

Example 2. An adjudication with a charge against the superior. A disposition of the same land with infeftment. A second adjudication within year and day of the first. The first adjudication excludes the voluntary right : the voluntary right excludes the second adjudication : and that adjudication is ranked *pari passu* with the first. By the general rule of time, the first adjudger draws his whole sum ; leaving the remainder of the fund to the voluntary right. This concludes

the ranking; for the second adjudger, being totally excluded by the voluntary right, has no claim against the first adjudger.

Example 3. A disposition of land. An adjudication with a charge against the superior. An adjudication without year and day, clothed with investment. And, after all, investment on the disposition. The adjudger invests draws his whole sum, leaving what remains to the disponent.

I conclude with the following observation. There is not much intricacy in computing what creditors ought to draw, where competitions are reduced to the simple cases above figured. But it requires a considerable degree of sagacity, to reduce to such simplicity the endless varieties that occur in rankings. The operation requires the same sort of sagacity that is requisite for reducing algebraic equations to their simplest terms. I know no rule for either. Practice is the only means for acquiring a facility in such matters.

A R T. XXXII.

What interest is sufficient to entitle one to sue or to defend.

N O rational man ever acts unless with an intention to produce some effect. Therefore, in a court of justice, however well founded an action or a defence may be in itself, it will be rejected as idle and foolish, if the person who acts can draw no benefit from it, or have no *interest* in it, as expressed in law-terms. Hence a rule, That *right* without *interest* will not be sustained in a process, either by way of action or objection : and as little will *interest* without *right*.

But mark, that in a process no person's interest will be regarded, but that of the person who acts. The social nature of man moves him to exert many actions for the good of others ; but there is a substantial reason that confines a judge to the interest of the litigants, without regarding the interest of others ; which is, that a decree is effectual between the litigants only ; and a court will give no countenance to an action or to a defence that cannot be effectual. If a decree could have any effect against a third party, it would be easy, by artful management, to procure a judgement against persons who all the
while

while are ignorant of what is going on against them *.

Because, where a man goes out of his road to urge a point he has no interest in, the pleading frequently respects the right of some third person; therefore the objection against a man who pleads what is not his own interest, is termed *jus tertii*; and that term is carelessly applied to every case where the person pleading has no interest, whether it regard the interest of any third person, or not.

With respect to the subject of this article, there is one general rule, That no interest is regarded in a process but what is pecuniary: a court of law concerns itself with nothing but what tends to augment or lessen a man's estate. The interest of ambition, of revenge, or of any other passion that is not lucrative, is totally disregarded.

When we descend to particulars, I can discover no rules for determining, in every case, what interest is sufficient to carry on a process, or to defend against it. The only way I have to give instruction, is to quote examples; which shall be classed in the best order that occurs.

I begin with examining what interest is sufficient to enable a pursuer to carry on his process. A contract between two apprisers, that neither of them should alien under pain of forfeiting his

* Principles of Equity, edit. 2. p. 60.

right, being transgressed by one of them, the other brought a process of forfeiture. The court refused to sustain action; because the pursuer had no pecuniary interest to bar the defendant from aliening *. Sir Robert Hepburn settled his estate upon Congalton younger, proviso, That he should marry Cockburn of Pilton's eldest daughter; otherwise that the estate should go to his younger brother. After Sir Robert's death, the young lady raised a process against Congalton, concluding, that he had lost the estate by refusing to marry her. Objected, That the pursuer had no interest to insist in a process that did not benefit her, but the defendant's brother. The court sustained process †. I cannot assent to this judgement. The pursuer had no interest but that of revenge, to which law gives no countenance. There is beside an invincible objection to the judgement, which appears to have been totally overlooked, which is, that the pursuer had no right to carry on the process: she was *posita in conditione* only, and no right was given her by the settlement, to found an action upon. A superior has a sufficient interest to reduce the re-tour of his vassal; because the reduction intitles him by a process of nonentry to levy the

* Durie, 11th February 1630, Ker *contra* Lempitlaw.

† Home, December 1684, Harcarfe (Alienation), February 1685, Jean Cockburn *contra* Congalton.

rents *. Land being comprised by an assignee, the proprietor, in order to set aside the comprising, has interest to insist in an improbation of the assignment †. An old feu-right having gone through many hands, and several of the mid-couples, or mesne-conveyances, being lost, the superior brought a reduction against the latest purchaser, who was in possession. The original charter of feu having been produced, it was decreed, “ That the pursuer could not object the
 “ want of the mid-couples, because he was liable,
 “ as representing the granter, to warrant the
 “ charter ; and that it was *jus tertii* for him to
 “ object to any right derived from the original
 “ feuer ‡.” The first branch of the interlocutor, finding the action excluded by the charter, is well founded. But not so the other branch, finding, that the pursuer had no interest to challenge any right derived from the original feuer. It was evidently his interest to show, that a null or defective title gave the defendant no right to the subject ; and consequently that he the pursuer was intitled to the possession. But as the action was

* Durie, ult. February 1628, Earl Nithsdale *contra* Westraw.

† Haddington, 19th January 1610, Ross *contra* Stewart.

‡ Forbes, 31st January ; Fountainhall, 1st February 1712, Earl Forfar *contra* Gilhagie.

ill founded in point of right, it was justly dismissed, as interest without right avails nothing.

The defendant comes next in order. And as every defendant finds his account in an absolvitor, it is obviously his interest to defend himself against a claim that is not founded on law. A sheriff having disobeyed a charge to take a debtor who was denounced rebel upon a horning, was sued by the creditor for payment of the debt. Objected, That the denunciation was informal; that the debtor could not regularly be imprisoned as a rebel; and therefore that he the defendant was not liable to pay the debt. The objection was sustained *. A debtor, imprisoned on a caption, being suffered to escape, the creditor insisted in a process against the magistrates for payment of the debt. Their objection was sustained, That the horning was null; and as the debtor was not a rebel, that they were not bound to detain him in prison †.

Next of objections against the pursuer's title, supposing the claim to be well founded in law. Such objections are either what appear from the production, or what require to be verified by evidence. With respect to the former, the defendant can never be barred by a *jus tertii* from

* Haddington, ult. January 1611, Caddel *contra* Vanse.

† Durie, 14th July 1626, Adam *contra* Bailies of Air.

stating them. For it is the duty of the judge himself, to take notice of such objections; and if he overlook them, they may be suggested by the defendant, or by any one as *amicus curiæ*. Take the following examples. In a suit for teind belonging to the lordship of Dunfermline, founded on a lease granted by King William, the pursuer's title was objected to, as flowing *a non habente potestatem*; because the lordship of Dunfermline did not belong to King William, but to James VII. heir to Queen Anne of Denmark. Answered, It is *jus tertii* for the defendant to plead on Queen Anne's right, seeing he derived no right from her. The objection was repelled, because the defendant derived no right from Queen Anne of Denmark *. The objection here to the pursuer's title was notorious: James VII. never was forfeited; and his abdicating the crown deprived him not of his private estate. As this objection was verified by the production itself, it was the duty of the court to dismiss the process, as the pursuer had no title to carry it on; and the defendant's right could not regularly come under consideration. In a process for arrears of teind founded on a charter of adjudication of the teind, with infeftment; this was not sustained as a sufficient title to force payment from the proprietor of the land, who had

* Fountainhall, 26th January 1699, Marquis of Tweeddale *contra* Sir David Thoirs.

levied the teind *. It was thought, that the adjudication itself ought to have been produced, with the title of the person against whom it was led. The pursuer's production might have been sufficient in a possessory action; but in a petitory action, which was the case in question, a complete progress is necessary for teind, as well as for land. As the defect of the pursuer's title was obvious from his production, the court justly denied action. And even supposing the title to have been good *ex facie*, to make it necessary for the defendant to verify some legal objection against it; such an objection, moved by the proprietor of the land, ought to have been admitted to proof; for he obviously had an interest to demand the teind from the patron at six years purchase, rather than from the titular at nine years purchase. Yet in a declarator of the property of teind, an adjudication both of land and teind, proceeding on a special charge to enter heir, was sustained as a good title, without obliging the pursuer to give evidence that the person to whom his debtor was charged to enter heir was titular of the teind †. Here the pursuer's title was evidently defective; and though it had been *ex facie* complete, the defendants had interest to

* Forbes, 29th November 1710, Mitchell *contra* Baillie.

† Earl Home *contra* Heritors of the parish of Eccles, 7th January 1729.

object to it, and to verify their objection. In the redemption of a wadset by an appriser of the reversion, it was objected by the defendant, that the apprising was cut down by the negative prescription. The court sustained process, and found it *jus tertii* for the wadsetter to object prescription *. Taking this judgement literally, it is ill founded; for a wadsetter, in a process of redemption against him, has an evident interest to object to the title of the pursuer, in order to retain a lucrative possession. But though he has an interest, yet he has no title to make the objection. Negative prescription operates in favour of the debtor only, and not in favour of any third party. It was competent to the reverser to object the negative prescription to the apprising led against him, but not to the wadsetter against whom the apprising was not led. And probably this is what was intended by the court. Against a declarator of the jurisdiction of a constabulary, the negative prescription being objected; the objection was sustained, and found not to be *jus tertii*; for though no person can have interest to plead exemption from the jurisdiction of the King's judges, every one is interested to plead exemption from a private jurisdiction, which is a

* Fountainhall, 7th November 1704, Nicol *contra* Park.

severe burden *. In this case, the distinction between public and private jurisdiction is well founded, but it did not regularly enter into the cause. Negative prescription was an objection to the pursuer's claim that required no proof; and as it was not controverted on the pursuer's part, no more was incumbent on the court, but to sustain the objection, and to dismiss the process.

We proceed to objections against a title *ex facie* good. The defendant will not be admitted to verify such an objection, either by writ or witnesses, unless it appear, that he has a sufficient interest to defend against the process. The following cases tend to clear what interest is sufficient. In a forthcoming on an arrestment, it was objected by the arrestee, That the debt which founded the arrestment was paid. The objection was relevant; but it was found *jus tertii* in the arrestee to move it †. The arrestee had no interest but to pay safely; and as here he had the authority of the court to make payment to the pursuer of the forthcoming, payment could not be demanded from him a second time, by the common debtor, or by any other. In a suit for arrears of teind, by a donatar of single escheat of a person who had right to that teind by tack,

* 7th December 1731, Lord Dun *contra* Town of Montrose.

† Durie, 21st December 1621, Hamilton *contra* Durham.

the defendant objected, That the horning was informal, and that escheat could not fall upon it. As the title appeared *ex facie* good, the objection was repelled, because the defendant was liable for the teind; and the obtaining a delay of payment, was not a sufficient interest to intitle him to vex the pursuer, by attempting to prove his horning informal *. A woman having paid a tocher with her daughter, who died within the year, action was sustained to her against the husband for restitution; it being found *jus tertii* for him, to object, that the tocher was paid out of the daughter's means, and that the claim belonged to her representatives †. A better method than finding a *jus tertii* for determining this cause to the satisfaction of all concerned, would have been an order to bring the representatives of the daughter into the field. James Ballantyne took a bond payable to himself, and after his decease to Ballantyne, his son. The blank was filled up with the name John, though John Ballantyne was not borne till after the date of the bond. Action however was sustained to him, after his father's death, against the debtor, who had no interest but to pay safely; and John's name was probably inserted by his father ‡. A

* Haddington, 23d June 1612, Earl Mar *contra* Ewing,

† Durie, 13th July 1627, King *contra* Ker.

‡ Stair; Dirleton, 5th January 1675, Ballantyne *contra* Edgar.

haver of writs was decreed to deliver them to a tutor-dative, who had found caution; though the haver offered to prove, that there was a tutor nominate, and no place consequently for a tutor-dative. For the haver had no interest to detain papers that did not belong to him *. In an exhibition *ad deliberandum*, the following objection was sustained against the pursuer, that he was not the nearest heir; of which proof was offered †. This appears a doubtful case. The defendant had an interest to keep his charter-chest from inspection. But in such a process, is that interest sufficient to oblige the pursuer to prove his propinquity? If the proof be easy, the hardship is not great: but in an exhibition *ad deliberandum*, it is a great hardship to force the pursuer into an intricate and expensive proof, which, after prevailing, is of no benefit to him, except against the defendant only.

Whether bare possession be a sufficient interest, will appear from the following cases. A lady, who was infeft in a liferent of land by her husband, now deceased, sued the tenants to remove. They objected, That she had no right, her husband being a liferenter only, and his son heir. Her title being *ex facie* good, the objection was

* Spottiswoode (Tutor), 11th July 1628, Skelton *contra* Brown.

† Forbes, MS. 10th February 1714, Crawford *contra* Crawford.

repelled

repelled as *jus tertii* to the defendants *. The tenants here, possessing without a lease, were thought to have no sufficient interest to intitle them to challenge the pursuer's right. In a declarator of property, the defendant, though in possession, was not permitted to object against the pursuer's title, as he did not pretend to have any right to possess †. In a removing from ward-lands, the tenant was found interested to alledge, that his deceased landlord had been denuded by a comprising and infestment; and consequently that the land did not fall in ward by his death ‡. Supposing the defendant to have been in possession by a current lease, which probably was the case, he had a substantial interest to object to the pursuer's title.

Next of *jus tertii* between competitors. One thing is clear, that each competitor, in order to obtain preference, is interested to state every relevant objection against his competitors. Thus, the nullity of a gift of escheat, as having been taken for behoof of the rebel, stated by a posterior donatar, was sustained ||. One served and

* Colvill, December 1582, Countess of Errol *contra* Tenants.

† Stair, 18th July 1662, Lord Fraser *contra* Philorth.

‡ Hope (Ward), 22d July 1625, Ld Ley *contra* Bar.

|| Haddington, penult May 1605, Douglas *contra* Spalding.

retoured heir having brought a reduction against a competitor infest as proprietor, it was found competent to the defendant to challenge the pursuer's right, as not being the nearest heir *. The interest of the defendant was clear; for a *res judicata* in his favour would have been no protection to him against the true heir. In a competition between two apprisers, it was objected by the posterior appriser infest, that the infestment on the prior apprising was null, being taken by an assignee to the apprising, who appeared to have no right, as the assignment was not produced. The objection was sustained as not being *jus tertii* †. A party infest in land, was permitted to object against a competing adjudication, that it was led on a bond extinguished by payment, though he derived no right from the person against whom the adjudication was deduced ‡. In mutual declarators of right to a salmon-fishing, one of the parties produced a right from a subject of an old date, but the progress was not well connected. The other produced a charter from the crown, of a later date. Each of them had been in possession at different times; but neither of them had acqui-

* Durie; Spottiswoode (Interest), 23d July 1630, Lord Pittligo *contra* Davidson.

† Stair, 22d July 1668, Johnston *contra* Arnold.

‡ Forbes, 18th December 1708, Elskine *contra* Hamilton.

red right by positive prescription. It was found *jus tertii* for the party who derived right from the crown, to insist upon the defect of his competitor's progress; seeing he did not connect with his competitor's author *. I am not satisfied with this judgement. A salmon-fishing, like land, requires a charter from the crown, or positive prescription on a charter from a subject. If so, a charter from the crown is preferable to any right derived from a subject that is not fortified by positive prescription. And therefore the party who derived right from the crown, ought to have been preferred, even though his competitor's progress had been complete. In a removing at the instance of an adjudger the legal of whose adjudication was expired, another adjudger, not within year and day, objected a nullity to the execution of the warning. The objection was repelled, as being *jus tertii* †. The posterior adjudger had no interest to keep the tenant in possession.

Hitherto of objections to the pursuer's title. Exceptions stand on a different ground. I have no occasion to plead an exception, such as compensation or *bona fide* payment, till the pursuer's title be sustained. And as the purpose of an ex-

* Fountainhall; Dalrymple, 3d December 1701, Forbes *contra* Udney.

† Fountainhall, Forbes, 30th June 1708, Rule *contra* Purdie.

ception is to free the defendant from payment or performance, an exception may be irrelevant, but never can be barred by a *jus tertii*; for it is always the interest of the defendant, to procure an absolvitor.

A R T. XXXIII.

Commentary on the acts of parliament concerning negative and positive prescriptions of forty years.

Property is a relation between men and things, that is not attended with any visible mark. I buy a horse, and pay for him upon delivery. This fact establishes the relation between me and the horse; but as the purchase makes no visible alteration, either in me or in the horse, the relation of property established thereby, is merely a mental conception *.

Such conceptions are not familiar among savages or barbarians. Something visible is necessary to give them a notion of property: they consider a man to be proprietor, who possesses and uses a subject at will; and, independent of possession, they have no conception of property. In the laws accordingly of many nations, possession is understood to be so essential to property, that the loss of the former always infers the loss of the latter †.

* Elements of Criticism, vol. 1. p. 336. edit. 5.

† Historical Law-tracts, tract 3.

In the progress of nations toward maturity of understanding, abstract ideas become familiar : property is abstracted from possession ; and in our conceptions it is now firmly established, that the want of possession deprives not a man of his property. If my horse be stolen from me, or be lost any other way, I am understood notwithstanding to retain the property *animo*, or mentally.

But how long can the property of a subject be retained mentally, when separated from possession ? Is the sense of property so vigorous, as to carry on the relation for ever ? This is a knotty question, that leads back to the very foundation of property. As man requires food, raiment, habitation, and other necessaries ; the materials from which these are formed, are placed within his reach, for his industry to work upon. And to favour his industry, he is endued with a sense of property, which protects every one's possessions from the rapacity of others. I lay hold of a field, never formerly occupied, and cultivate it for my own use : the perception I have of its being my property, is clear and complete ; and it is equally so, where I purchase a field from a person whom I know to have been the first occupant. This perception continues equally clear and complete while I retain possession *.

* Sketches of the history of man, book 1. sketch 3.

Connected with the perception of property, is an affection of which property is the object, and which every man feels with respect to what he possesses as his own. This affection, weak at first, becomes more vigorous by time: the use of living in a certain house, or cultivating a certain field, enlivens gradually my affection for the subject as my property, even to extreme old age.

Let us examine the operation of these principles, where one has lost possession of a subject. It is mentioned above, that a man recently deprived of a subject against his will, retains the property *animo*; and it is evident, that his affection for the subject continues as vivid as before. But do matters continue in that state for ever? The answer must be in the negative. The man retains his property *animo*, and his affection for it, as long as he has any hope of recovery; but they turn fainter and fainter by length of time. Hope at last vanishes; the subject wears out of remembrance, and is absolutely forgotten. The loss of a moveable soon wears out of memory, if it be not of great value. Land, which is a permanent subject and produces a stronger affection, continues longer in memory. But where the subject has been long lost and no remembrance of it remaining, the relation of property is dissolved: the sense of property does not support the relation in that case; but leaves the
subject

subject open to a new occupant, precisely as before it was first appropriated.

But whatever may happen to a moveable, land seldom remains long unoccupied. It frequently happens, that while I yet keep my subject in remembrance with some remaining affection for it, another has purchased the subject *bona fide* from one who behaved as proprietor. This is the nicest case that can happen with respect to property: let us carefully examine what the moral sense dictates upon it. If recently after the purchase, it be discovered, that the person who sold had no right; the purchaser, upon consulting his conscience, will find himself bound to restore the subject to the true proprietor, provided he still retain his affection for it, and have kept it all along in view. But supposing the *bona fide* purchaser to have been long in possession, and to have acquired a strong affection for the subject; the moral sense will determine in his favour, against an antagonist, whose affection for the subject must by this time be weak, and his remembrance faint. This antagonist and his heirs have had time to digest their loss; and by this decision of the moral sense, their condition is not rendered worse than it has been many years. Nor need any one be alarmed; for care and attention will secure every proprietor from suffering in that manner.

How wisely is this matter ordered! The nature

ture of man would be imperfect with respect to the goods of fortune, were a subject passing from a man without his consent, exempted from commerce as long as it is preserved in memory. At that rate, property would rest upon a very crazy foundation: no man could be secure of a subject, though purchased by him in the fairest manner: he would always be in dread of latent claims; and he would never think of improvements. And yet, upon land depend all the necessities, and most of the conveniences, of living. The goods of fortune are bestowed on man for his well-being; and it would contradict the designs of Providence, to withdraw any subject from commerce, so as to be useful to no person. Consent therefore is not the only means for transferring property: the law of nature sustains a *bona fide* purchase with long possession, as a good title; though it was derived *a non domino*. There is perhaps at this day, not a single foot of land possessed upon a better title; for who is it that can show a chain of uninterrupted conveyances from the first occupant?

The time necessary for transferring property without consent, depends on circumstances, which are different in different cases. But utility requires, that a precise time be fixed to take place in every case, otherwise law-suits in matters of prescription would be endless. As this cannot be done by the law of nature, which gives

to

to every circumstance its due weight, it is left to municipal law. All that can be said in general is, that for the sake of peace, the interest of the present possessor ought to be chiefly regarded in fixing the time. If the former possessor be cut out when he still retains hope of recovering the subject, it seldom happens without negligence on his part.

Thus, *bona fide* possession of a subject, whether moveable or immoveable, continued so long as to produce in the possessor an affection for it as his own, is, in the law of nature, one mode of acquiring property. And as property is in this case acquired without deriving right from the former proprietor, the present possessor is consequently secure against every claim of property. He may safely admit, that the claimant was formerly proprietor; but he urges it as a principle of the law of nature, and as essential to the well-being of society, that men be secure in their possessions, honestly acquired. The right of an individual yields here to public utility, as every such right ought to do.

That the sense of property is finely tempered, to produce all the good possible with the least hurt, will appear as follows. In the first place, as possession of land or of moveables in common is unfriendly to industry and improvement, man is disposed by nature to appropriation; and every man is protected in his lawful possession by the sense

of property, and by the moral sense. In the next place, as land and its product are destined for the use of men, every man is intitled to lay hold of what is necessary for supplying his wants. But as all men are by nature equal, no man is intitled to cut out others, by occupying more than he has use for. If he could justly occupy more, avarice would have no bounds: the first savage who landed in Britain, might claim the whole island as his property *. In the third place, as transference of property by permutation, buying and selling, and other covenants, is essential in society, consent with delivery are the ordinary means for producing that effect. But if consent were indispensable for dissolving the relation of property, subjects would be often left *in medio*, abandoned by the proprietor, and yet

* It seems to be an established law among European nations, That new land belongs to the state by whose subjects it is discovered; and that to ascertain the property, no more is necessary but a cross, or some other memorial of the occupation. I am at a loss to comprehend upon what principle this law is founded. A man who settles upon a field that belongs to none, becomes proprietor; but symbolical possession will confer no right, either on the person who uses the symbol, or on the state whose subject he is. To acquire the property, and to exclude others, there must be real occupation. Nor will real occupation appropriate more than what may be sufficient for the man and his family: the remainder lies open to new adventurers.

extra

extra commercium as to others. The law of nature has more wisely regulated property for the public good. A man loses his property, when his hope of recovery is at an end; and the subject lies open to the first occupant. And even where he retains his property *animo*, it is however transferred to the person who attains possession *bona fide* upon a title of property, and who has contracted an affection for the subject by long possession. The laws of property are thus calculated, to produce the greatest good possible with the least hurt. Without prescription, property would often prove a snare to entrap the innocent.

We proceed to examine, whether, by the law of nature, other rights be lost by time, as well as a right of property. An obligation is a relation between two persons, one who has a right to claim, termed *obligee*, and one who is subjected to the claim, termed *obligor*. When the relation of property wears out of memory, it is dissolved, and is at an end as if it never had existed. The same holds naturally with respect to an obligation. Let us next suppose, that the obligee retains some faint memory of the obligation. Even in this case, if he have negligently been long silent, he will find it against conscience, to give disturbance to the obligor who has acquired a conviction of freedom. A proprietor is deprived of his subject, by suffer-

ing another to possess it *bona fide* for a long course of time; and the conviction of freedom ought to have the same effect in law with the conviction of property. The obligée indeed is in that case deprived of his claim; but it is a less hardship that he should suffer by his negligence, than that his party should suffer who has been in no degree culpable. A man, diving into the charter-chest of his ancestor, finds evidence of an obligation which he is sensible the obligor is ignorant of. If not more ancient than forty or fifty years, he will probably think his claim not unjust, even supposing the obligor to be in straitened circumstances. But every year beyond, he will find it more and more against conscience to distress a family, who for many years have had not the least suspicion of such a claim.

In thus limiting the endurance of obligations, the moral sense is wisely adjusted to our external circumstances. A man of prudence regulates his expence by his fortune; and is approved by all, if he exceed not his annual income. But were he laid open to debts contracted by a remote predecessor, and long neglected, it would often prove a severe forfeiture, reducing him from ease and affluence to bitter misery. He would have a feeling of injustice, and be provoked to exclaim against the oppression of law. If the obligation be revived, the benefit to the creditor will bear no proportion to the suffering of the

the debtor; for pain pierces deeper than pleasure, and its impression is of longer endurance. A man who suffers by his own negligence, has no just cause of complaint.

As negligence is thus a capital circumstance in the dissolving obligations by length of time, it ought carefully to be distinguished from delay. What if the creditor be reduced to a situation that disables him to make a demand, till the debtor, or his heirs, have acquired a conviction of freedom? He has been a slave in Algiers many years; or has been long in hiding, to prevent a criminal prosecution for his life. In such cases, there is delay, but not negligence. It is hard indeed on the debtor to have his effects torn from him for payment of a sum he never reckoned on: but in a competition between two individuals, where the public is not concerned, justice ought always to prevail over hardship.

But now supposing negligence on the creditor's part, what will be the result where the claim is retained in memory by the debtor? This case coincides with that of a *mala fide* possessor, who never can acquire the property by any length of time. The creditor's negligence will not excuse the debtor, who ought to have prevented that negligence by payment. Nor would it be excusable in a court of law, to sustain a defence made against conscience.

The obligations that are cut down by the law
of

of nature, are those only which are intended to be made instantly effectual, or within a time specified. In such, every hour's delay in demanding performance, is a loss to the obligee; and consequently a proof of his negligence. Alternative obligations are in a different predicament. Where a man provides to himself an option of demanding one thing or another, and is not by the covenant confined as to time; his delay may proceed from difficulty in making a choice, and therefore is no proof of negligence. Nor can the obligor ever acquire from such delay a conviction of freedom. It is hard indeed for an obligor to be kept in suspense for ever; but he has himself only to blame, for he might have limited a time for the option.

A conditional obligation is nearly allied to one that is alternative. It may not always be in the power of the obligee to perform the condition; or it may not always be his interest: and therefore, delay in demanding performance, does not necessarily infer negligence. Take the following example. A lucrative office in the King's court, makes me think of erecting a magnificent house near the palace; but not being perfectly resolved, the proprietor of a piece of ground agrees to let me have it at a certain sum, whenever I shall find it convenient to build. Perceiving a decline in favour, I hesitate, and delay building till I see how matters will turn out. As there is here no
negligence

negligence on my part, my hesitation and delay can afford no conviction of freedom to my party, or to his representatives.

A right acquired by covenant over the person or over the property of another, to be exercised or not according to my fancy or my interest, comes under the same predicament. A reversion in a sale of land is a proper example. It is not always in my power to repay the price; and it may sometimes not be my interest. Therefore, the longest delay in demanding back my land, will be no proof of negligence on my part, nor afford to the purchaser any rational conviction that I am never to make the demand. A power to revoke a donation between husband and wife, a power to burden, a power to alter a settlement, are of the same nature. A man can never be deprived of such a power, unless he be limited within a time certain.

In order to give a just notion of our acts concerning the prescription of forty years, I found it indispensable to examine with attention what the law of nature, or, in other words, common law, dictates upon that subject. And having thus paved the way, I proceed to a commentary on these acts.

Prescription is of two kinds; one that relates to property, and one that relates to obligations. The former is termed by our writers *Positive Prescription*, the latter *Negative Prescription*.

These terms are intelligible; and may pass in law-writings, though scarce agreeable to the analogy of language. Negative prescription is justly defined to be the dissolution of an obligation by length of time. Positive prescription is defined, the acquisition of a subject by length of time. The latter definition holds with respect to a moveable subject; but we shall soon see, that in the law of Scotland positive prescription has a very different meaning with respect to land. I begin with Negative Prescription, as in some measure preparatory to the other.

Negative Prescription.

THE time necessary for completing negative prescription, varies according to circumstances, some regarding the persons interested, some the nature of the obligation; and therefore is left by the law of nature to judges, whose province it would be, in every particular case, to proportion the time to the circumstances. But as such latitude would render judges arbitrary and law-suits endless, it was wisely done by our legislature, to fix a time that should be a rule in every case; and accordingly forty years is made the rule by act 28. parl. 1469. A shorter time would cramp people in the management of their affairs: a longer time is unnecessary; for as forty years exceed

exceed the ordinary remembrance of man, they are in effect equivalent to the longest duration. The act declares, "That if an obligation be allowed to lie over forty years without a pursuit, it shall be of no avail." The law of nature liberates a debtor, who, by his creditor's negligence, has acquired a conviction of freedom. Nothing was left to our legislature, but to accommodate the law of nature to practice, by fixing the time of presumed remembrance, within which an obligation must be put in suit.

Little acquainted with the law of nature are they, who hold prescription to be a creature of municipal law *: which leads to another error, that negative prescription is a punishment inflicted by municipal law on a creditor for neglecting to prosecute his claim. Negligence is not a subject of punishment; nor is it the intention of the act 1469, to inflict a punishment on the creditor for his negligence. It favours indeed a debtor, who, by the forbearance, or perhaps negligence, of his creditor, has acquired a conviction of freedom; which consequently renders the obligation of no avail. But if this be a punishment, every man is punished who suffers another to take the start of him in diligence.

I dare not affirm, that the decisions of the court of session have no taint of these errors."

* Grotius *De jure belli ac pacis*, lib. 2. cap. 4. sect. 1.

Though the act 1469, adhering to the law of nature, has no view but to fix a time for negative prescription, our judges, holding erroneously the act to be correctory of the law of nature and not a confirmation of it, did not venture at first to go a single step beyond the precise letter of the law. From the words, "That an obligation shall prescribe within forty years," it was held, that monolateral obligations only are comprehended, and that a mutual contract is not *. The same error led the court to judge, that after prescription of forty years, the defendant is not bound to give his oath whether the debt be resting owing; and though he should confess it, that he is not *in foro humano* liable †. Was it the opinion of the judges, that forbearance or negligence is declared a crime by the act, and punished accordingly? Was it their opinion, that they were tied down by the act to commit injustice, by sustaining a defence insisted on against conscience? Was it their opinion, that the creditor's negligence will justify the debtor for refusing to pay a sum he knows to be due? The court of session came in time to entertain more correct views with respect to this statute. Discovering that it is founded on common law, or, which is the same, on the law

* Durie, 26th February 1622, Hamilton *contra* Lord Sinclair.

† Fountainhall, 7th December 1703, Napier *contra* Campbell.

of nature ; they extended it to every case that falls under its spirit and intendment. They extended it to testaments : they extended it to a reduction on the head of deathbed, and to every reduction ; to tacks, and to servitudes real and personal : they extended it to contracts, not excepting contracts of marriage, where there is a mutual delay of performance. But what if a contract be kept alive by the minority of one of the parties ? He may demand performance, but not unless he perform what is incumbent on him ; for interruption of the negative prescription on his part, cannot have the effect to change a mutual contract into a monolateral obligation. It would have been too great a stretch to extend the act to heritable bonds ; considering, that at the period of the act, they were a species of wadset, and not obligations for payment of money. It required therefore another statute to make heritable bonds, and other land-securities, fall by the negative prescription. And this was done in the second head of the act 12. parl. 1617. The words are, “ And sikelike his Majesty statutes and ordains, That all actions upon heritable bonds, reversions, contracts, or others whatsoever, shall be pursued within the space of forty years after the date of the same.” The contracts here mentioned must be understood to be contracts concerning land ; one of which is mentioned, viz. a reversion :

with respect to other contracts, there was no occasion for a new statute. A right of property, whether of land, or of a moveable, differs so widely from a *jus crediti*, and even from a right burdening land, that it was never understood to be comprehended in either of the two statutes establishing negative prescription. And therefore, though a right of property cannot subsist for ever without possession; yet the time of its endurance is limited by the law of nature only as above mentioned, not by either of these statutes.

As the debtor's conviction of freedom arising from the creditor's forbearing to make a demand, is the foundation of the negative prescription, the act 1469 requires a document to be taken by the creditor, in order to awaken the debtor out of his dream of security. No activity on the creditor's part will be sufficient, but what has the effect of an interpellation to the debtor. An obligation may be the subject of conveyances from hand to hand, and may be brought into a summons, or even into letters of horning: yet if the debtor have not been interpellated, he is free after forty years. It has accordingly been found oftener than once, that registration alone does not interrupt *. Nor was even registration with let-

* Spottiswoode, *Prescription*, 27th November 1630, Lord Borthwick *contra* Smeiton; Stair, 12th January 1672, Johnston *contra* Lord Belhaven.

ters of horning, found sufficient, because it requires a charge to interpel the debtor *.

It is implied in the act 1469, that the negative prescription should not begin to run but from the term of payment; because till that term be elapsed, a demand cannot be made, nor a document be taken on the obligation, as expressed in the statute. For the same reason, the negative prescription of an action of warrandice, is, in the statute 1617, declared not to commence from the date of the obligation of warrandice, but from the time of the distress. Yet with respect to an heritable bond, the negative prescription is declared, in the same statute, to commence from the date. Why this difference? An heritable bond was at that time a species of wadset: it contained no obligation for payment, and consequently no term of payment. But as an heritable bond contains now an obligation to pay, and a term of payment, the negative prescription will not begin to run against it before that term.

It is observed above, in tracing the law of nature, that if the creditor have been prevented from doing diligence, prescription will not run against him. Negligence cannot be imputed to a creditor during the time of his slavery in Tunis or Algiers. Hence *Non valens agere* is a fact that interrupts the negative prescription. For a simi-

* Dalrymple, 11th December 1717, Wright *contra* Wright of Kerse.

lar reason, minority is an interruption : a minor is not understood to be acquainted with his own affairs ; and therefore his silence will not be imputed to him for a fault.

Neither by the law of nature, nor by statute, do any obligations fall by negative prescription, unless where the creditor must blame himself for negligence in delaying to make a demand. Of that nature are pure obligations, intended to be made instantly effectual, or within a time specified ; where delay is a loss to the obligee, and consequently a proof of his negligence. But there are obligations which it may be the interest of the creditor to delay for a long or a short time. Three kinds of these are mentioned above, alternative obligations that give an option to the obligee, conditional obligations, and obligations that bestow a privilege on the obligee to act, or not to act, at his pleasure. And as with respect to these our statutes differ not from the law of nature, all that remains for me, is to illustrate this doctrine by a few additional examples. A man lends L. 1000 to bear interest, and stipulates to himself an option, to demand back the sum, or a farm belonging to the debtor, reckoned of equal value. This is an example of the first kind. Here delay in making the option is not a proof of negligence, for it may proceed from irresolution ; and therefore an obligation of this kind falls not by the negative prescription. Take the following

following examples of a conditional obligation. I take an obligation from a neighbour, to allow me the use of his water for a bleachfield that I intend to erect. Being in expectation of a coal-mine, I take an obligation from a neighbour, to allow me a road through his ground for my coal-waggons. With respect to such obligations, it is not always my interest to demand immediate performance. The bleachfield may require more money than I have to spare at present: it may be prudent to delay an expensive operation on my coal, till the coal about me become scarce. Delay in these cases is not the effect of negligence, but of prudence. A sale of land under reversion, is a proper example of the third kind. If the reverser be not limited as to time by covenant, he may demand back his land at any time, upon offering to restore the price. It is implied in the very nature of the bargain, that the right of reversion should not fall by the negative prescription; and accordingly it is expressly excepted from that prescription in the second head of the act 1617. But shall it be in the power of the reverser to keep the purchaser in suspense for ever? Equity affords a remedy. It is against the public interest, as well as against the interest of the purchaser, that his land should be put *extra commercium*. After the reversion has subsisted forty or fifty years, why should not a declarator be competent to the purchaser; concluding, that the court ought

ought to name a time for claiming upon the reversion, after which the reversion shall be at an end? And there is great equity for applying the same remedy to the other cases mentioned. A power to revoke a donation between husband and wife, a power to burden, a power to alter a settlement, are also examples of the third kind. But as these powers are personal, they die with the person who has them; and a court of equity, therefore, will not interpose to limit them to a shorter time. Such powers are distinguished in our law by the appellation of *Res mera facultatis*.

There is another species of rights and privileges more properly termed *res mera facultatis*, because they concern the privileged person only, and affect not others; such as my chusing a spot for a kitchen-garden, planting a tree, or building a house at my march. It is the purpose of the negative prescription to relieve the obligor from a burden; but here no person is burdened. Such rights therefore may be exercised *quandocunque*. Thus, I can take up a title of honour, or serve heir to a predecessor, at any distance of time. Others may be affected consequentially; but no person suffers directly.

There are certain duties and restraints imposed upon individuals, not for behoof of other individuals, but for behoof of the public. The public there stands as the obligee; and prescription o-

perates not against the public. Such restraints however do not always answer the end proposed; and though they fall not by the forty years prescription, yet if there be a total forbearance for a very long time, they fall into disuse, and cease to bind.

Having discussed the subjects that fall not under negative prescription, we proceed to its operations on subjects that fall under it. I begin with annual prestations; of which the interest payable yearly on a bond of borrowed money, is an example. After forty years the bond falls as to the principal sum; but does it also fall as to the interest that became due within the forty years? The purpose of the negative prescription is to quiet the minds of people, by securing them against antiquated claims. As no document has been taken on the bond for forty years, the statute declares, that it shall be of no avail. Now if the bond be of no avail, it cannot be the foundation of an action for any of its provisions or articles. Add a separate argument, That the bond may have been forged, or liable to some other total objection, the evidence of which is lost by length of time. In the Roman law accordingly the interest, as well as the principal, were cut down by the negative prescription. “Eos qui
“*principali actione per exceptionem triginta vel*
“*quadraginta annorum, five personali, five hy-*
“*pothecaria, ceciderunt, (jubemus), non posse*

“ super usuris vel fructibus præteriti temporis a-
 “ liquam movere quæstionem, dicendo ex iisdem
 “ temporibus eas velle sibi persolvi, quæ non ad
 “ triginta vel quadraginta præteritos annos refe-
 “ runtur, asserendo singulis annis earum actio-
 “ nes nasci: principali enim actione non sub-
 “ sistente, satis supervacuum est super usuris vel
 “ fructibus adhuc iudicem cognoscere *.” To
 vary the case a little, we shall suppose, that the
 debtor becomes bound to pay the sum borrowed,
 not at one term, but at two terms. The credi-
 tor makes a demand, in less than forty years af-
 ter the second moiety became due. The doubt
 here is, that prescription begins not to run but
 from the term of payment. Here there are two
 terms of payment; and if we compute the forty
 years from the latter, prescription has not run,
 at least of the moiety last payable. On the o-
 ther hand, there has been a delay of forty years
 from the time that action was competent for pay-
 ment of the first moiety; and the bond may
 have been kept latent to prevent objections. Mo-
 ved by these reasons, it seems the safer side to
 sustain the prescription. And the court appears
 to have been of the same opinion in the follow-
 ing case. A widow having lived forty years af-
 ter her husband, without demanding her annuity,
 her representatives insisted for the annuities that

* L. 26. Cod. De usuris.

arose within the forty years. The right of liferent itself was found to be prescribed; and the defence of prescription was sustained with respect to the annuities claimed *. They gave a different judgement in the following case. Though a bond of pension granted to an advocate had lain over forty years, without any document being taken on it; yet a claim for the yearly pensions that fell due within the forty years was sustained to the advocate's representatives †. This would have been right, had every year's pension been contained in a bond by itself. Thus, as to the negative prescription of annual prestations, the following conclusions appear well founded. First, That if the obligation itself be cut off by prescription, none of its accessories can subsist. Second, That a document taken upon the obligation, preserves it entire with all its accessories.

As a right to tithes is a right of property, it falls not by negative prescription. But arrears beyond forty years fall under it. A claim for feuduties is precisely similar.

The cases of negative prescription that are the most intricate, arise from obligations where there are more than one creditor, or more than one debtor. As the purpose of the statute is mere-

* Forbes, 6th July 1711, Stewart *contra* Children of Cummin of Pitoulie.

† July 1730, Lockhart *contra* Duke of Gordon.

ly to fix the time of prescription, such cases are left to common law. The following examples relate to co-creditors. An assignment to a bond of borrowed money lies over forty years without being intimated to the debtor; but during part of the time, the cedent's heir was minor. If the assignee insist for payment in his own name, the negative prescription will meet him: but he may insist in name of the cedent's heir; and upon a proof of the minority, the defence of negative prescription must be repelled. The result will be different where the assignment is intimated. By that intimation the cedent is completely denuded: the assignee must insist in his own name; and if forty years have elapsed since the intimation, the debtor is free. In a competition for mails and duties between two real creditors, one had right to an apprising by a disposition, and the other had right to the same apprising by an adjudication. The disponent was preferable; but had done no diligence for forty years: the adjudger had preserved his right entire by diligence. The adjudger was preferred to the mails and duties *. This is a case *in apicibus juris*. One thing is clear, that the debtor, if left at liberty, has it in his power to prefer either of the competitors at his pleasure. He can put the disponent out of the field, by pleading the ne-

† 26th November 1728, Fraser *contra* Mackenzie.

gative prescription; and then the adjudger, left without a competitor, can levy the mails and duties: or he may forbear to plead the negative prescription against the disponee; who consequently will levy the mails and duties upon his preferable right. But equity will not suffer such game to be played. The debtor has no interest to plead the negative prescription, because, in all events, the mails and duties must be paid to one or other of the competitors: he may therefore be justly set aside as having no concern in the question; and when he is out of the field, the disponee must be preferred, as having the preferable right. This is one of many cases that is better fitted for the silence of a study, than for the bustle of a court of law.

An infestment of annualrent is conveyed, in one deed, to John and James, equally betwixt them. John's right is saved from the negative prescription, by drawing payment of interest, or by a process of mails and duties. James has done nothing for forty years. John's diligence will not save James, who has taken no document on his claim. But then can the debtor have acquired any conviction of freedom with respect to the claim of James, which he sees established in the same deed with that of John? This is a difficult case. James, it is true, has been negligent; but negligence alone is not a sufficient ground for the negative prescription. I incline to distinguish

guish the original debtor from his heir or successor. When the original debtor is sued by James for payment after the forty years, he ought not to be suffered to plead the negative prescription, when he must be conscious, that he has not paid a shilling to James, principal or interest. His heir or successor is in a different condition. He is warranted to plead, from the silence of forty years, that the debt has been paid, or discharged. This reasoning is also applicable to an adjudication disposed to two persons equally.

Next as to co-obligants. It must be yielded, that a co obligant cannot reasonably entertain the same conviction of freedom from the creditor's delay, that a single obligant may have : the creditor may have been abundantly diligent against the other co-obligants. But at that rate, a co-obligant may be kept bound for ever, without ever hearing of the debt, contrary to the spirit of the law of nature, or of common law. The hardship is great, and calls for a remedy. The remedy is easy ; which is, to oblige the creditor to take a document against each of the co-obligants. Between two persons so intimately connected as creditor and debtor, equity certainly rules, that the one should be relieved from a very great hardship, by imposing a very slight burden on the other. Our decisions however, I am sorry to say, square not with this conclusion. It has frequently been found, that prescription

is interrupted as to every co-obligant by diligence done against any one *. And an infeftment of annualrent having been constituted upon two tenements by two different seifins, a poinding of the ground of one of the tenements, was found to preserve the right alive upon the other tenement, though they belonged to different proprietors †. The court in these cases seem to have formed a notion, as if the negative prescription were only intended to punish the negligence of creditors; and consequently that it cannot operate against a creditor who has in any degree been active. It ought to have been considered, as above mentioned, that negligence is not a subject of punishment; and that the intendment of negative prescription, is to quiet the minds of people who have acquired a conviction of freedom, from being left undisturbed forty years. The court judged more correctly in the following cases. A party was exempted from the jurisdiction of a regality, having more than forty years answered to the sheriff's court only, and never once to the regality-court; though the jurisdiction of regality was in constant exercise as to

* Stair; Dirleton, 18th December 1667, Nicolson *contra* Laird of Philorth; Forbes, 23d February 1714, Earl of Marchmont *contra* Home.

† Stair, 22d June 1671, Lord Balmerino *contra* Hamilton.

others *. The whole barony of Musselburgh, comprehending the tenement of Coldcoats, was, by a constitution in writ, thirled to the mill of the barony, belonging to the town of Musselburgh; and the town had been in the uninterrupted possession of the whole multures, those of Coldcoats excepted. In a declarator of thirlage, the town of Musselburgh against Wauchope of Edmonstone, proprietor of Coldcoats, negative prescription was pleaded. Answered, That the town's possession of the multures of the rest of the barony, preserves their right entire as to the whole. But the court, justly considering that the defendant had acquired a conviction of freedom by the lapse of forty years, sustained his defence of prescription. The nature of the subject in controversy, paved the way to this judgement: the several tenements that compose a barony are separate subjects, and frequently not conterminous, being connected only by a common charter; which makes it easy to conceive, that some of the tenements may be free, while others are thirled. The case is fundamentally the same in a thirlage of *omnia grana crescentia*. And yet, in that thirlage the defence of prescription was repelled with respect to the multure of bear; because the thirlage was preserved alive as to all

* Stair, 23d November 1671, Rolland *contra* Laird of Craigyvar.

other grain *. What seems to have misled the court in this particular is, that the several species of grain comprehended under a thirlage of *omnia grana crescentia*, are more intimately connected, than the several tenements that are subjected to it.

Positive Prescription.

It may be proper to premise a short sketch of the Roman *usucapio*; because our positive prescription is held to be of the same nature, by every writer on the law of Scotland; though erroneously, as shall be made appear, with respect to land. *Usucapio* is defined, “*adjectio domini per continuationem possessionis temporis lege definiti* †.” *Usucapio* accordingly is one of the modes of acquiring dominion or property. The time was at first a year in a moveable, and two years in land; a pregnant evidence, that the sense of property, separately from possession, was but in its infancy when *usucapio* was introduced. Property originally was lost with the possession, as above hinted; and by this regulation it appears to have been the opinion of the Romans, that

* 25th July 1727, Macleod *contra* Vassals of Muiravenfide.

† l. 3. *De usurpationibus et usucapionibus*.

property could not have any long endurance independent of possession. In the days of Justinian, when abstract ideas had become familiar, and property was clearly distinguished from possession, three years were declared necessary for *usucapio* in moveables, and ten, or twenty, in different cases, for *usucapio* in land.

How far the Roman *usucapio* obtains with us in moveables, will appear from what follows. First, With respect to a moveable found by accident, that appears to have passed through the hand of art, and which therefore must have been appropriated, occupancy will not transfer the property to the finder. If the moveable have not been lost forty years, the proprietor is presumed to have retained the possession *animo*, and he will be preferred to all the world. If forty years have elapsed from the time of his loss, he is cut out, and the moveable goes to the fisc. *A fortiori*, it will go to the fisc if no proprietor appear; which is the case of waith and stray goods, of wreck, of a treasure found in the ground, &c. But any of these particulars acquired from a putative proprietor, will go to the acquirer, upon possessing forty years, which completes *usucapio*. The former proprietor may have retained the hope of recovery; but his right yields to that of his competitor, who by long possession has acquired an affection for the subject.

A moveable never formerly appropriated, belongs

longs to the finder as the first occupant. If it be uncertain whether the moveable have been formerly appropriated or not, the finder may lay hold of it, and the property will be his, unless some person appear, and prove that it was formerly his property. If he appear soon after the new occupancy, the subject must be restored to him. But if the finder have continued forty years in possession upon the *bona fide* title of first occupant, the property will be transferred to him by *usucapio*.

With respect to land, our positive prescription differs widely from the Roman *usucapio*. All the lands in Scotland are understood to have flowed from the sovereign originally ; and every portion of land that is abandoned by the proprietor returns to the sovereign, and is not left open to the first occupant. If a portion of deserted land be laid hold of by a private person, no length of time will transfer the property to him ; because he ought to know that it belongs to the crown, and that he can have no right.

Thus, before the act 12. parl. 1617, fixing forty years for completing positive prescription, it was necessary, in a competition about the property of land, that each of the competitors should connect with the crown. The longest possession, without a crown-charter, yielded to such a charter of the latest date. For some time after writing was employed in land-property, this was no

hardship ; because title-deeds were few, and easily preserved. But in a long progress from the King, where the land has passed through many hands, title-deeds multiply greatly ; and great must have been the difficulty of preserving them entire during the feudal anarchy, when even the nearest neighbours entertained deadly feud against each other. The loss however of any one connecting title was fatal. Suppose a family-estate to have been possessed two or three centuries by connected services ; yet if the charter from the crown was missing, the family had no defence against a charter of yesterday obtained by another from the crown. Or suppose the original charter to have been preserved, yet any gap in the progress might be fatal, the loss of a disposition to a singular successor, of a procuratory of resignation, of a precept of *Clare constat*, or of any other midcouple. Nor was this all. At the period of the act 1469, fixing the course of the negative prescription, writing was rare ; it was confined to notaries : and forgery was unknown. But when writing became common, and yet not brought to such perfection as that different hands could be clearly distinguished, the easiness of committing a forgery was a strong temptation to designing men. Before the seventeenth century accordingly, forgery became frequent, dangerous above all to proprietors of land.

Wonderful it is, that, even among a rude people,

people, a law so replete with mischief to land-proprietors, was so long submitted to. The first attempt to a remedy was act 214. parl. 1594, having the following preamble: "That sundry of
" the lieges, and their predecessors and authors,
" have bruikd their lands by infeftment for the
" space of forty years: notwithstanding whereof
" the said infeftments are sundry times drawn in
" question for lack of procuratories or instru-
" ments of resignation, precepts of *Clare con-*
" *stat*, or other precepts of seisin, which are not
" extant, to be produced and used, in respect
" the same are tynt and amitted, partly by ini-
" quity of time, partly by perishing of proto-
" cols," &c. For these reasons it is enacted,
" That where parties, and their predecessors and
" authors, have had a continued possession forty
" years on charter and seisin, they shall not be
" bound to produce procuratories, or instru-
" ments of resignation, precepts of *Clare con-*
" *stat*, or other precepts of seisin; provided the
" charter bear, that resignation was duly made,
" and the instrument of seisin make mention of
" the precept." Improvements that have in-
veterate practice to struggle with, are faint in their
commencement, and flow at first in their pro-
gress. The remedy here was extremely faint,
as it removed but a very small part of the evils
specified above. It was however a lucky attempt,
as it paved the way to the illustrious statute 1617,
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which may justly be considered as the palladium of our land-proprietors : its rationality and expedience have been confirmed by the practice of more than a century and a half.

This statute consists of two heads. The purpose of the first, is to secure proprietors against every person claiming the property. The purpose of the other, is to protect them against real debts and claims affecting property. Upon the first head, the preamble is in effect the same with that of the act 1594 : “ Our Sovereign Lord
“ considering the great prejudice his lieges sustain in their lands and heritages, not only by
“ the abstracting, corrupting, and concealing
“ their true evidents in their minority, and by
“ the amission thereof through war, plague, fire,
“ &c. ; but also by the forging of false evidents,
“ and concealing the same for so long a time,
“ as that all means of improving thereof is taken
“ away ; whereby his lieges are constitute in a
“ great uncertainty of their heritable rights,”
&c. : Therefore enacted, That possession for forty years without interruption upon a title of property shall give an unquarrelable right, good against all mortals, and against all objections, falsehood only excepted. And to that end, it is declared sufficient, that the possessor produce for his title, either a charter and seisin of the land, or instruments of seisin, one or more, continued, and standing together, for the said space of forty years,
proceeding

proceeding either upon retours, or upon precepts of *Clare constat*.

There are two evils to which every proprietor of land is liable. One is the hazard of losing title-deeds, which increases with the time of possession; the other is the hazard of false deeds, kept latent till all means of detection are gone. The same remedy is provided for both; which is, that possession forty years upon a title of property, shall be held a complete right to the land, effectual against every competitor. This not only frees the possessor from the necessity of producing more ancient titles, but secures him against antiquated claims of property, upon the statutory presumption, that they are not true and honest claims.

The security of land-property is the purpose of the act 1594; and to make it still more secure, is the purpose of the first head of the act under consideration. In neither of the acts is there the slightest hint of depriving a man of his property by neglect, and of transferring it to another by peaceable possession. They are founded on the most liberal principles of justice: they secure property, after long possession, against the loss of ancient title-deeds; and they secure it against latent claims of property that may justly be presumed ill founded when suffered to lie long dormant. Our positive prescription of land-property, ought to be carefully distinguished from

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the Roman *usucapio* ; for there is no resemblance between them.

An inclination to differ from others is not agreeable ; but I stand not single with respect to the doctrine here inculcated. I am supported by Lord Dirleton, who breathed the true spirit of law, if any ever did. He observes, “ That
“ the positive prescription is introduced, not so
“ much *odio et negligentia non petentis*, as *favore possidentis* *.” How comes it then that the statute 1617 is treated by all our writers, Lord Dirleton only excepted, as an odious remedy, depriving a man of his property without his consent ? Our law-authors were educated abroad by professors of the Roman law ; and having had no professors at home, they were left to gather the law of their own country by hints, scraps, and occasional practice. As in several articles our law resembled that of the Romans, prepossession for the Roman law led our authors insensibly to adopt that law, and to pass it for our own, where-ever they could discover any appearance of a resemblance.

But to return to the statute. With respect to the first head, it is enacted, That those who have possessed forty years on a title of property “ shall
“ never be troubled, pursued, nor inquieted, by
“ his Majesty, nor by any other superior or au-

* Dirleton’s doubts, *Prescription against the King*.

“ thor, nor by any other person pretending right
“ to the land by prior infestments, public or pri-
“ vate, nor upon any other ground, reason, or
“ argument, except upon falsehood.” These
words are plain and peremptory, admitting no
objection to the statutory title but singly that of
falsehood; an exception that scarce needed to
have been mentioned, because a false title is no
title: it is a title in appearance only, not in rea-
lity. We are authorised by the statute to pre-
sume every thing in favour of long possession.
The possessor’s ancient titles connecting him with
the crown, may have been lost: his competitor’s
titles may have been forged; or supposing them
true deeds, he may have been denuded, forty
years ago, in favour of the possessor, or of those
he connects with. In a word, possession forty
years on a title of property, is declared, by the
statute, to be a complete title to land, that must
prevail in every competition. The possessor has
no occasion to plead negative prescription, or a-
ny other ground, against his competitor’s right;
he need say no more but that his own title is pre-
ferable. The law of prescription is in every part
consistent with itself. Land-property, as obser-
ved above, is not subjected to negative prescrip-
tion by our statutes; and if after forty years a
claim of property could be sustained against the
party in possession, the positive prescription would
afford no security: the act 1617 would be an idle

attempt, without success. The statute is guilty of no blunder : it secures the possessor against every claim of property, public or private, without needing the assistance of the negative prescription. And it makes no difference, whether the competing title be proof against the negative prescription *sua natura*, or be kept alive by a *non valentia agendi*, or by minority, or by any other means. If it be urged, that an innocent person ought not to be forfeited of a just claim ; I answer, that a claim latent forty years is justly suspected of having been kept in the dark in order to evade detection ; and therefore is not a just claim. But possibly the claimant may have been *non valens agere* the whole forty years, or part of them. This case is extremely favourable for the claimant ; and yet even here, the right of an individual ought to yield to public utility. The statute, in preferring the possessor, has acted by an equitable rule, That where public utility is at variance with the interest of an individual, the former ought to prevail. Nor is more done in the statute, than is commonly practised even by a court of equity *. The public utility here is obvious. Were any excuse to be sustained to one who claims the property for not appearing within the forty years, the salutary purpose of the statute would, in a great measure, be frustrated.

* See Principles of Equity, conclusion of book 2.

The possessor might be troubled, pursued, and inquieted, not for forty years only, but for four hundred. And as there can be no record of a *non valentia agendi*, of minority, nor of many other interruptions, the record could be little depended on in making a purchase of land. It is hard indeed to make the positive prescription operate in such cases: but it is a maxim in law, as well as in politics, That a small evil ought to be submitted to for preventing a greater; and there cannot be a greater evil than uncertainty about the property of land, which would bar all improvements.

With respect to minority, in particular, it is justly protected against the negative prescription; the declared purpose of which is, to render a claim suspicious, and to cut it down, because it is not prosecuted in time: now such neglect cannot be attributed to a minor, who is not supposed to have any knowledge of his own affairs. In the court of session accordingly, minority is sustained as an interruption of the negative prescription; though the act 1469 declares in general, that obligations shall be of no avail after forty years, unless a document be taken upon them; without any mention of minority as an exception. The positive prescription is very different. In a competition among creditors, minority affords no privilege: the slightest defect of form is available against a minor, as well as against one

of full age, to postpone him to other creditors. And the same rule ought to hold in a competition about the property of land.

I give peculiar attention to the case of minority, as I reckon upon strong prepossession against me from the decisions of the court of session; though all of them, as far as I know, are of a late date. The first case where minority was found to be privileged against the positive prescription, is Hamilton-Blair of that Ilk *contra* Feuers of Kerseiland *. Hamilton-Blair having right as patron to the teinds of the parish of Dalry, brought a process against the feuers of Kerseiland, for payment of the teinds of their lands. The defendants produced charters and seifins from Ker of Kerseiland containing an heritable right to the teinds of the lands, upon which possession was continued forty years without interruption. The pursuer answered, That the positive prescription was interrupted by his minority; and the reply was, That minority interrupts not the positive prescription. The question was thought worthy of a solemn pleading; and the following judgement was the result. "The Lords find, " That the years of minority must be deducted " from the years of positive prescription." The pursuer's counsel pleaded the case, as if our positive prescription were the same with the Ro-

* 6th December 1754.

man *usucapio*, where one man loses his right *non utendo*, and another acquires it *utendo*. Were our positive prescription of that kind, minority would be an effectual interruption; for, in the Roman *usucapio*, one cannot acquire a subject by possession till the former proprietor have lost it by dereliction, resembling our negative prescription, which runs not against a minor. But it is cleared above, that positive prescription in Scotland, is entirely independent of the negative; and that positive prescription, being a complete title, is exclusive of every other title. The judges divided on this question. Such of them as were for the judgement, did not enter into the distinction between positive and negative prescription with respect to minority: they suffered themselves to be led by the authority of Stair and Mackenzie, and by the prepossession of common opinion. This judgement paved the way to another, given lately, in the case of Campbell of Ottar, where a title of property to a land-estate, kept alive by successive minorities, was found good against the positive prescription; though possession had been continued more than fourscore years, upon an unexceptionable title of property.

With respect to both cases, the last especially, it puzzles me to conceive what occasion there could be for bringing minority into the question. The claimant had no occasion for minority: he had a
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more simple proposition to maintain, viz. That a right of property falls not by the negative prescription ; and consequently requires not the support of minority, nor of any other interruption. And it is observed above, that if the positive prescription could not take place without the negative, it could never take place.

With respect to interruptions in general, the act 1617 declares in effect, that no interruptions shall avail against the positive prescription, but what disturb peaceable possession of the land ; and it is of great importance to the public, that the law should stand so. We have seen how precarious land-rights were originally. The positive prescription was introduced, when the art of husbandry was in its infancy : and but for that prescription, it never could have arrived to any maturity ; because no man who is not secure in his possession, will bestow skill or labour in fertilising his land. But if a claim to land without possession could be kept alive by minority, by a *non valentia agendi*, or by other particulars that interrupt the negative prescription, a land-holder, even after a forty-years possession, would have little encouragement to lay out his money upon building, inclosing, planting, or other costly improvements : the ground would yield scanty crops, and the public would suffer. The salutary effects of negative prescription are far from being so extensive : it concerns only two individuals,

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an obligee and an obligor; and it is of little concern to the public, whether the obligor be protected from performance by negative prescription, or whether the obligee make his claim effectual by proving interruptions. It is a matter of private right; and justice rules, that the creditor should not suffer, seeing he is not blameable for his delay.

To illustrate the doctrine above laid down, that positive prescription is entirely independent of negative prescription, I lay hold of a point, more than once determined in the court of session; which is, Whether a deed of entail can be cut down by prescription? In order to talk intelligibly, I state a simple case. A land-estate stands entailed upon heirs-male, with clauses irritant and resolute; and the entail is completed according to the directions of the act 1685. The eldest son of the entailer, neglecting the entail, makes up his title to the estate as heir of line; by which the estate becomes a fee-simple in him; and he and his male descendants continue in possession upon that title more than forty years. The succession at length opens to a female, the only child of the last possessor; and she, as heir of line, makes up her title to the estate. By her succession, an interest arises to a collateral heir-male, who claims as heir of entail. This claim is not cut down by negative prescription; for an evident reason, that till the heir-female appeared,

peared, the claimant had no interest upon which to found an action; and therefore could not be guilty of negligence in forbearing. Nay, a case can be put where he would have a better chance for the estate as heir of line, than as heir of entail; which is, that he had a number of daughters without a son, while the heir in possession had neither son nor daughter for many years that he lived with his first wife; and came only at the close of life to have a son by a second wife. But still further, his claim as heir of entail against an heir-female in possession, is a claim to the property of the estate; and it is laid down above, that negative prescription cannot be objected to such a claim. But it is clear from the act 1617, that the claim of the heir of entail is cut down by positive prescription. The female heir who, by completing her title as heir of line, has become proprietor of the estate, pleads, in the very words of the statute, that she and her predecessors having possessed forty years on a title of property, "she is secure against every other person
"pretending right to the estate, upon any
"ground, reason, or argument, except upon
"falsehood." The deed of entail may have been forged: it may have been altered or discharged. In a word, every possible supposition is admitted as true, that tends to support the right of the present possessor. And justly; for if the possessor be protected by positive prescription
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against a stranger, whose title to the estate must have been sustained had it been produced within the forty years; much more ought she to be protected against the heir of an antiquated entail. To cut down the stranger may in reality be a forfeiture of his right to the estate; to cut down the heir of entail, is no greater stretch than to deprive him of a hope of succession, which may often be both distant and uncertain. Such a trifling interest ought not to weigh against the interest of every landholder; and still less against the interest of the society in general, as improvements can never go on in a country where the property of land remains in any degree uncertain. And accordingly where an estate has been possessed for forty years as a fee-simple, the positive prescription has been sustained against the heir of entail, in every case brought before the court; particularly with respect to the estate of Achluncart, 31st December 1693; with respect to the estate of Mackerston, 10th July 1739; with respect to the estate of Kirkness, 3d February 1753; and lately, 17th December 1776, in the important cause between Douglas of Douglas and the Duke of Hamilton.

We proceed to the second head of the act 1617, extending negative prescription to heritable bonds, and to other heritable securities. Forty years possession on a title of property, is exclusive of every other title of property; be-

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cause the same subject cannot belong to two persons at the same time : but as a right of property is consistent with a real security for debt, possession *qua* proprietor is not exclusive of a real security. What protection then have land-proprietors against a real security that has lain dormant above forty years ? I answer, that by the law of nature, and by common law, a man who has acquired a conviction of freedom is protected from antiquated claims. The act 1469 was made to enforce the law of nature, and common law, with respect to personal obligations ; and the second head of the statute 1617 was made to enforce them with respect to real obligations. The words are, “ And sicklike, his Majesty statutes “ and ordains, That all actions competent of the “ law upon heritable bonds, reversions, contracts, or others whatsoever, shall be pursued within the space of forty years after the “ date of the same.” As here the negative prescription is extended to real claims, and as that prescription is founded on negligence, it follows, that every circumstance which purges negligence must be admitted here, as well as with respect to personal obligations. The statute accordingly declares minority in this case to be an interruption ; and from parity of reason, *non valens agere* must also be an interruption. Here, by the by, a very strong argument can be drawn from the statute itself, that minority does not interrupt

interrupt the positive prescription. When an express exception of minority from the negative prescription of real securities, was thought necessary; can any man believe, that it was left to be implied as an exception from positive prescription? It is not naturally an exception; and had the legislature intended to make it an exception, there was much more reason for speaking out, than in the case of negative prescription.

The statutes of this island are not illustrious for profound knowledge. The exceptions are few, and the present act 1617 is one of the most illustrious. It is strictly agreeable to the common law, and to the law of nature, not only in the principal parts above displayed, but in every minute particular. Take for example a right of reversion, which is mentioned above in the class of *res mere facultatis*, where a man provides to himself a power to exercise the faculty or not, as he finds it convenient; and where therefore delay is no evidence of dereliction, nor even of negligence. Conformable to this definition, the statute provides, That an action upon a right of reversion shall be perpetual; provided the reversion be ingrossed in the infeftment, or be recorded, which remove all suspicion of forgery or falsehood. But a letter of reversion distinct from the infeftment, and not recorded, falls by the negative prescription. Why? Not from dereliction or negligence; but from suspicion of falsehood,

or other defect, the evidence of which is lost by length of time. Advert to another particular. The negative prescription of an action of warrandice, is declared not to commence from the date of the obligation of warrandice, but from the time of distress. The reason is good : before distress, no action of warrandice lies ; and till warrandice be competent, no length of time can infer a suspicion of negligence or of falsehood. Why then is it enacted, that a pursuit on an heritable bond must be commenced within forty years of its date ? This is explained above. An heritable bond, a species of wadset originally, was not an obligation for payment of money, and consequently could not have a term of payment. In its present form, it is an obligation for payment of money, and has a term of payment ; from which term prescription will commence as in other obligations.

Thus, heritable bonds, and other heritable securities, preserved alive against negative prescription, must, for the reason above given, prevail also against positive prescription. But these must be distinguished from a process of redemption founded on a letter of reversion. For though the reversion be recorded, which secures it against negative prescription, it is not however effectual against positive prescription. It is a claim to the property of the land, clogged only with a condition of paying a certain sum ; and as
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positive prescription makes a complete title to the property, it excludes, of necessary consequence, a claim of redemption, no less effectually than it excludes every other claim of property.

A R T.

A R T. XXXIV.

Analysis of act 39. parl. 1555, about the warning of tenants.

AS far back as our law can be traced historically, Martinmas appears to have been the term of the entry and removing of tenants *. But in the sixteenth century, and perhaps more early, Whitfunday had become the term of entry and of removing; whether from the difficulty of transporting household-furniture, and other goods, through bad roads, in the dead of winter, or from other causes, our authors give us no information. Craig, setting forth the form of warning before the statute under consideration was made, mentions Whitfunday as the only term of removing. “ Dominus ante fores coloni, cui verbo denunciaret ut ad proximam Pentecosten migret, lancem ligneam, sive discum escarium, in duas partes frangebatur, eo symbolo diremptum jus fœderis et locationis significans †.” And he adds, “ Secundo post Pentecosten die, nisi colonus volens migraverit, vi eum ex ædibus pellebat, pecora sive boves ex bovilibus ejiciens, suas pecudes ad

* See article 17.

† Lib. 2. dieg. 9. sect. 4.

“ pascendum inducens.” Lord Stair * joins his authority to that of Craig. “ The order of removing of old (says he) was thus. The master of the ground did only verbally intimate to the tenant to remove at the next Whitsunday ; and the only solemnity requisite was, that before the said term he appeared before the door of the tenant, and broke a lance there, as a symbol of his breaking the tacit relocation between them ; whereupon, the second day after Whitsunday, he came *brevi manu*, and expelled the tenant.” At the same time, the authority of these writers is little necessary, when we have the authority of the statute itself, mentioning Whitsunday as the only term of removing. It appoints, “ That the master of the ground give a precept of warning in writ, commanding his officer to go, forty days preceding Whitsunday, and intimate to the tenant, that he remove himself, his family, subtenants, &c. at the said term.” This fact I wish to be kept in view ; for it will contribute greatly to a just analysis of the statute under consideration.

It appears not that the legislature intended to alter the practice at that time established, concerning either the time of warning, or the term of removing ; but only to introduce regularity and order in the form of removing ; instead of

a removing *via facti*, which, in those rude times, commonly produced riots, and breaches of the peace. Listen to Craig in the place above quoted. “ At
 “ cum sæpe fieret, ut colonus, suis amicis fretus,
 “ migrare nollet, et vi domini vim opposeret,
 “ factum est sæpe, ut qui viribus plus posset, is
 “ in possessione esset potior; tantumque de vi, et
 “ violentis fructibus, domino, si pellere colonum
 “ non potuisset, superesset actio; inde cum gra-
 “ vissimæ sæpe contentiones procederent, sæpe
 “ etiam ad manus perveniretur.” In that view it is enacted, that if the party warned, removed not at the term, the warner shall apply to a proper court for a decree of removing; to which succeeds a precept of ejection. And to secure access to a proper court, it is ordained, “ That
 “ shiriffs and other judges ordinair hold courts
 “ all the lawful fifteen days immediately after
 “ Trinity Sunday, for doing justice in the said
 “ causes.”

This was a remedy for the evil in view; but it generated a greater evil of a different kind. Every process that has a personal conclusion, is in effect a complaint against a party, for doing what he ought not to have done, or for omitting what he ought to have done. At the time of this statute, accordingly, and for many years after, there could be no process, till the party had done what was wrong, or omitted to do what was right. A process, for example, could not
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be raised against a debtor before the term of payment ; because till that term was elapsed, it could not be subsumed, that he had omitted what he ought to have done. Nor could a process of removing be raised against a tenant, till the term of removing was passed. The statute accordingly does not direct a court of removing to be held before Whitsunday, the term of removing ; but as soon after as possible, viz. immediately after Trinity Sunday, which is the first Sunday after Whitsunday. It is amazing, that, even in an age of darkness, the insufficiency of this regulation was not foreseen. A landlord, after warning his tenant to remove at Whitsunday, engages another to enter at that term. He cannot eject the possessor, as formerly, to make way for his new tenant. He must apply to a judge, and cannot bring his complaint till the term of removing be past. The possessor, assisted by his procurator, invents many defences, sufficient to prolong the process perhaps for a year. The new tenant is left without resource, not a house to protect him from the cold, nor a mouthful of grass to preserve his cattle from famine. The condition of landlords was deplorable. They could not with safety engage a new tenant, till the possessor was actually ejected ; and the land must have lain waste the rest of that year.

Violent diseases operate frequently their own cure. Necessity introduced a salutary deviation

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from common law ; which is, to sustain a process of removing before the term of removing. The commissioners for administration of justice appointed by Oliver Cromwell, appear to be the first who thought of a remedy for this disease. In the record of their proceedings, is found the following regulation : “ That summons of removing before the supreme judges, may be raised
 “ at any time after the warning, to be executed on twenty-one days ; providing the day of appearance be six days after the term.” Lord Stair saw the necessity of some such measure. “ Legal execution,” says his Lordship, “ is not
 “ competent ordinarily till delay, because none
 “ should be pursued till he have failed ; yet in
 “ some cases the debtor may be pursued before
 “ the term, to pay at the term, as *si vergat ad*
 “ *inopiam*. Yea, in removing, it seems very
 “ expedient to pursue the party warned, even
 “ before the term, to remove at the term ; otherwise the lands cannot be safely set, the
 “ tenant not knowing if others will remove willingly : and there ought to be no uncertainty in that point, which is a public interest *.” Reformers in religion differ widely from those in law. The former, enthusiastically zealous, overturn every established form, and stop not till not a vestige be left of the national creed, or the na-

* Book 1. tit. 17. sect. 15.

tional ceremonies. The latter, cool and cautious, proceed with circumspection : being afraid of consequences, they seldom reach perfection ; nor do they always venture so far as even their judgment would lead them. In the present case, the commissioners, sensible of the imperfection of common law, ventured to allow a summons of removing to be raised before the term of removing ; and yet they adhered so far to the old law, as to appoint the day of compearance to be six days after that term : which was but half a remedy, or rather no remedy at all ; for a process commenced before the term of removing may be protracted for months ; and what is the new tenant to do in the mean time ? Lord Stair, sensible of the insufficiency of this improvement, gives his opinion, that the process of removing may be carried on and concluded before the term, decreeing the tenant to remove at the term, ready for execution if the tenant should prove refractory. And such processes are now frequent and familiar.

Beside requiring a process of removing in order to prevent private violence, which was the chief purpose of the statute ; another alteration was introduced, which is, to require the warning, and service thereof, to be in writing. In all other respects, the usual form was preserved. Whitsunday was the usual term of removing ; and the warning accordingly is appointed to be

forty days before that term. With respect to any other term of removing, the act is silent: it is not provided for in the act, but left to common law. There is nothing said in the act, nor insinuated, that the warning must be forty days before Whitfunday, whatever be the term of removing. And if so, may it not fairly be inferred from the act itself, that if forty days be sufficient where Whitfunday is the term of removing, the same number is sufficient whatever be the term? There can be no reason assigned, for privileging a tenant who removes at Martinmas, with a more early warning, than when the removing is at Whitfunday. But we are not left entirely to an argument from analogy. Balfour, in his chapter intitled, *Anent removing*, reports a case, Lord Borthwick *contra* Sym, 19th May 1565, in the following words. “ In actions of removing of tenants, the warning is not sufficient “ except there be forty days free between the “ warning and the term of Whitfunday or Martinmas, excluding not only the day of warning, but also the day of Whitfunday or Martinmas.” In this case, but ten years after the statute, we have the greatest lawyer of his time laying it down as a rule, That the warning must be forty days before the term of removing, whether Whitfunday or Martinmas; and he is far from understanding the act as appointing the warning to precede Whitfunday whatever be the

the term of removing. That learned author could not mistake the meaning of a statute, which probably was framed by himself, undoubtedly with his concurrence.

Sir George Mackenzie, however, in his observations on this statute, lays it down, " That
" warning must be made before Whitfunday,
" though the person warned be not obliged to
" remove by his tack till the Martinmas." And this erroneous opinion has been blindly followed, not only by later writers, but even by the court of session, which is much more to be regreted.

I term this an erroneous opinion, because it is clear beyond a cavil, that the time of warning is not regulated by the statute, except where the removing is at Whitfunday. And Sir George had no authority, either from the statute or from analogy, to say, that warning must be made before Whitfunday, even where Martinmas is the term of removing. The statute begins with requiring warning to be made forty days before the feast of Whitfunday. The precept of warning must be read at the parish-church, and a copy must be affixed on the most patent door, forty days before the term, i. e. the term of Whitfunday, the only term mentioned in the act. Then comes the following clause: " And
" if the party warned in manner foresaid remove
" not at the term, (i. e. the said term), in that
" case

“case the warner shall apply to the judge,” &c. Every article here points at Whitsunday as the term of removing. But what makes it certain, that Whitsunday was here understood to be the term of removing, is the clause appointing judges to hold courts for proceßes of removing immediately after Trinity Sunday, being the first Sunday after Whitsunday. At the time of the statute, as mentioned above, a proceß of removing was not competent before the term of removing. And to appoint courts for proceß of removing to be held immediately after Whitsunday, necessarily implies, that Whitsunday was the term of removing.

Our present practice, in several cases that may be figured, will be found inconsistent with an express clause in the statute, “requiring that the “warning be given within a year of the term “of removing.” Such a case was lately brought before the court. The term of entry and of removing was Beltan, which is the first day of May. Here is an evident dilemma. Warning, it is said, must here be given before the preceding Whitsunday; and yet, if so given, it is null by the clause now mentioned, being more than a year before the term of removing. A warning farther back than a year, may render the tenant negligent about another farm, hoping a change of mind in his landlord. Thus, according to the meaning of the act adopted in practice, one part
of

of it is made to contradict another. Does not this shew, that the adopted meaning is erroneous? If the warning must always be given within a year of the term of removing, does it not necessarily follow, that warning must not always precede Whitsunday? And if it must vary in some cases, what reason can be given why it ought not always to be forty days before the term of removing?

The opinion of Sir George Mackenzie, upon which our present practice is founded, deserves little regard, considering, that he quotes for his authority three decisions of the court of session, two of them not to the purpose, and the third a very lame authority. The first is in Durie *. A tack being to expire in September, the landlord executed a warning before Whitsunday; and subsequent to that term, raised a process of removing, concluding, that the tenant should remove at the expiry of his tack in the September following. The defence was, That neither the warning, nor action of removing, could be sustained while the tack was current. The court sustained the warning; but found, that the action of removing could not proceed before expiration of the tack. Here we find the old law in vigour, That a process of removing cannot proceed till the term of removing be past: which

* 8th July 1626, Foulis.

is all that is material in the judgement ; for as to the warning, it was childish to make the objection, when the very purpose of a warning is to notify to the tenant, that he must remove at the term. But what I am only concerned to observe here is, that the court did not find, that the warning must be before Whitsunday, where removing is in September or at Martinmas : they did not even insinuate, that such was their opinion. The second decision, reported also by Durie *, is not more to the purpose than the first. Nothing is determined, but that a warning before the term of removing is proper ; which no mortal ever doubted of. The third decision, quoted by Sir George, is also from Durie †. The subject was a kail-yard, the entry to which is commonly at Candlemas, the time for digging and manuring. The possessor being warned forty days before Candlemas to remove at that term, it was objected, That the act 1555 requires the warning to precede Whitsunday. The court refused to sustain the warning, “ seeing it was not
 “ made before the ordinary term of Whitsunday,
 “ to remove at Whitsunday, as use is in other
 “ warnings and removings.” There is here undoubtedly an error, either in the report, or in

* 16th December 1628, English *contra* Tenants.

† 15th June 1631, Ramsay *contra* Weir.

the printing ; for the court was incapable to give an opinion that did not touch the point in dispute. But supposing that opinion to have been given, the meaning of the court must have been, that Whitfunday removings only are regulated by the act 1555, and that removings at other terms are to be regulated by practice. Beside that a kail-yard seems not to be comprehended under the act. It is this very opinion however that moved Lord Stair to lay down, that all warnings must precede Whitfunday. His words are, " This order must be used, though the term " of the tack be not at Whitfunday, but at Mar- " tinmas or Candlemas ; and it will not suffice " to be made forty days before these terms ; " 15th June 1631, Ramsay *contra* Weir *." He adds the following very insufficient reason. " The warning before Whitfunday is appointed, " that tenants may timeously provide for them- " selves ; which cannot be but before Whitfun- " day, the ordinary time lands use to be set." *Aliquando bonus dormitat Homerus.* A warn- ing before Whitfunday avails nothing to a tenant who cannot remove till Martinmas, whatever number of farms be open at Whitfunday. Mar- tinmas, at the same time, is a term of removing frequent in Scotland ; and when a tenant re- moves at that term, he may have a farm as rea-

* Lib. 2. tit. 9. sect. 40.

dily as when he removes at Whitfunday. It is unlucky that this obvious reflection did not occur to his Lordship; for his authority, influencing the court, has embarrassed removings, and established a practice inconvenient both to landlord and tenant. The landlord must warn between seven or eight months before Martinmas, where that is the term of removing. Many things may occur to make him change his mind; and forty days before Martinmas, he notifies to the tenant, that he may continue where he is. But, unluckily for both, the tenant has engaged himself to another landlord. The inconvenience to the tenant is still greater. A warning very long before the term is no indication of what the landlord's mind will be when the term of removing approaches; and hoping a change of mind, he forbears to seek for another farm. Much experience has taught us, that forty days is a proper space: the tenant has sufficient leisure to inquire for another possession; and there is no prospect, that in so short a space the landlord will change his mind. A warning ten or eleven months before the term, instead of directing the tenant's conduct, puzzles him with uncertainty. Fond of his possession, he would gladly hope favour from his landlord: he is irresolute; and finds too late, that he must remove without having secured another farm.

A R T.

A R T. XXXV.

Analysis of act 16. parl. 1617, appointing
registration of feifins, &c.

THE act has the following preamble : “ Con-
“ sidering the fraudulent dealing of par-
“ ties, who, by their unjust concealing of some
“ private right made by them, render the sub-
“ sequent alienation done for great sums of mo-
“ ney altogether unprofitable.” To remedy
such fraud, a public register is appointed, in
which all reversions, &c. and all instruments of
feifin shall be recorded within threescore days of
the date ; under certification, that the said writs,
not being recorded within the said space, “ shall
“ make no faith in judgement, by way of action
“ or exception, in prejudice of a third party who
“ hath acquired a perfect and complete right to
“ the land.” But it is declared, “ That the
“ said writs shall be effectual against the granter,
“ his heirs and successors.”

To analyse this act, we begin with examining
what are the deeds that are secured by it ; and next,
against what hazards such deeds are protected.
With regard to the former, the legislature evidently
had nothing in view, but to secure *bona fide* pur-
chasers for a valuable consideration. The statute

is in favour of purchasers, not creditors: an apprising, an adjudication, an infeftment of annual-rent, are all of them left to common law. With respect to the other head, the security granted is against latent voluntary rights only. So says the statute; and all the deeds specified required to be recorded, are voluntary deeds, reversions, regresses, bonds of reversion, assignations thereto, discharges of the same, renunciations of wadsets, &c. These deeds admit not possession or infeftment, and are by their nature real, and consequently effectual against singular successors. It was therefore a most salutary regulation, to appoint these to be recorded. The act stops there; and makes no provision against any latent right but what is voluntary; and against such latent right, if such can be figured, a purchaser is not secure, if the right be in its nature real.

The statute has afforded an additional security to purchasers, by appointing all instruments of seisin to be recorded. It might seem at first view, that the regulation should only comprehend seisins that proceed upon voluntary deeds; as such deeds are the only deeds that are appointed to be recorded. But the enactment is general; and justly so: with respect to a seisin on an adjudication, to mention no other, there is the utmost expediency that it should be recorded; for otherwise no purchaser would be secure.

It

It is a matter of greater doubt, what the legislature intended with respect to a seisin on a retour, or on a precept of *Clare constat*. The certification in the act is not applicable to that case: it would be nonsense to say, that the seisin of an heir, unless recorded within threescore days, shall make no faith in judgement against a third party who hath acquired a complete right to the land. An heir, whether his title be recorded or not, cannot enter the lists against any person deriving right from the ancestor. Neither do the other clauses reach this case. The words of the preamble, "the unjust concealing of some private right made by them," do not comprehend the heir; and as little the concluding words, "that the said writs shall be effectual against the granter, his heirs and successors."

On the other hand, the words are precise and peremptory, That all instruments of seisin shall be recorded. And if, for securing purchasers, it appear, that no seisin requires more to be recorded than that of an heir, there can remain no doubt of the will of the legislature as expressed in the words. This will appear from a common and familiar example. An heir serves to his predecessor, is infeft, but thinks not of putting his seisin upon record. After his death, the next heir, perhaps a distant collateral, believing the former heir to have died in apparency, serves to the remoter predecessor as the last infeft; and after

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ter possessing some years, sells the land for a full price. After his death, a third heir, discovering that the first heir, who was supposed to have died in apparenacy, had been infest, makes up his title as heir to him; and within the years of prescription brings a process against the purchaser, concluding, that his author's service to a wrong predecessor was erroneous; and therefore that he the purchaser has no right to the land. Supposing the infestment of an heir to be good in law without recording, the pursuer must prevail; which would render every purchase from an heir not a little perilous. But what puts this matter beyond doubt, is cotemporary evidence of the meaning of the legislature. The register appointed by the act begins 19th August 1617; and the very next day a feisin is recorded, proceeding on a precept of *Clare constat* by Ludovick Duke of Lennox to John Lord Lindsay; and other feisins of the same kind are from time to time recorded in great plenty. Had the court of session ordered a search in the record, they would not have found, as they once did, that the feisin of an heir without being recorded, is good against a singular successor *.

The act 1695, concerning the three years possession of an heir-apparent, gives indeed some relief to a purchaser for a valuable consideration.

* Dalrymple, 17th December 1703, Keith *contra* Sinclair.

But beside the hazard of the heir's death who falls within the three years, many deeds highly favoured in law are left unsupported by that act; a bond of provision, for example, a settlement of an estate, and other deeds highly rational.

But now admitting, that the feisin of an heir ought to be recorded, what certification is provided against an heir who neglects to record his feisin? and what is to be the consequence? It is but too evident, that the certification in the statute is not applicable to an heir; and that with impunity he may transgress the statute, if no other compulsion be provided. To say what shall be the effect of a statutory injunction, ordering or prohibiting a thing to be done, without adding any penalty, would require much discussion. What at present is only incumbent upon me, is to examine what is to be the consequence of an heir's neglect in this case, where no certification is added. The recording is made necessary by the act; and the recording must be held an essential solemnity, like designing the writer and witnesses in a bond, made necessary by act 1681. The neglect is a nullity; and the feisin, by that neglect, is no better than if the solemnity of delivering earth and stone were omitted. A purchaser ought to see the feisin on record, without which he can have no reliance on it.

In the foregoing analysis, I have adhered strictly to the words of the act. I now proceed to
view

view the act in the light of equity and expediency, in order to fulfil the purpose of the legislature, without regarding the defect of words: It was undoubtedly the purpose of the legislature, to facilitate the commerce of land, by securing *bona fide* purchasers, for a valuable consideration, against such latent rights as are real, and consequently are effectual against purchasers; and the means employed, are the requiring such rights to be recorded, in order to put purchasers on their guard. The only rights mentioned are reversions, and other voluntary rights; because probably such only occurred to the legislature. But as no cause can be assigned, why a purchaser should not be secure against other latent rights as well as against what are voluntary, it deserves consideration, whether it be not the duty of the court of session, to complete the purpose of the legislature, by securing purchasers against every latent right, voluntary or not. A reversion is, by act 27. parl. 1469, made effectual against singular successors. And if a reversion must be recorded under certification of losing its privilege, no other right whatever ought to be exempted.

That the court of session will proceed to complete the security intended for purchasers, may be hoped, but cannot with certainty be foretold. But which-ever of the systems be adopted, that of strict law, or that of expediency, the common law continues in force as to every particular, purchasers

chasers only excepted. A feisin, for example, upon a precept of *Clare constat*, requires not recording as a solemnity, except as to purchasers: in all questions among heirs or gratuitous disponees, it continues to be a title of property, though it be not recorded; precisely as a reversion not recorded continues to be effectual against heirs and gratuitous disponees. All that the statute requires, is only that it must be recorded, to secure it against a purchaser for a valuable consideration.

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ART.

A R T. XXXVI.

Analysis of act 32. parl. 1661, concerning heritable and moveable bonds.

A Bond containing a clause for payment of interest, was of old held to be an heritable subject. The heir of the creditor made up his title to it by a general service; and the heir of the debtor, not the executor, was ultimately liable. Such bonds were rendered moveable by act 57. parl. 1641; and that act having been rescinded by a general clause along with the other acts of that period, such bonds were again rendered moveable by the act under consideration.

The meaning of the act is in practice held to be, That a bond bearing interest is rendered moveable in every respect, so as to belong to the next in kin of the creditor, and to burden ultimately the next in kin of the debtor. This is laid down by Lord Stair in the following words. “ There
“ is another considerable difference betwixt the
“ condition of the wife and children, introduced
“ by the act of parliament 1641, revived parl.
“ 1661, cap. 32. whereby bonds and provisions
“ bearing clauses of annualrent, which before
“ were

“ were heritable, are now moveable as to the
 “ bairns, nearest of kin, executors, and lega-
 “ tars ; and are at the defunct’s disposal by testa-
 “ ment, or any deed on deathbed. And they
 “ are exhaustible by debts of the same nature,
 “ which debts do not exhaust the relict’s part *.”

And the rule here laid down is constantly followed in practice.

I find not that this construction of the act has any support, either from its words or its intention. There is not the least appearance of any intention but to revive the act 1641. It was indeed not revived in express terms, because it was thought improper to honour so far any statute of that period : but it was revived in effect ; not only by renewing what was there enacted, but by a retrospect in order to validate every thing that had been done under its authority. And so fully was its preamble in view, that it was not thought necessary to give any preamble to the reviving act. Therefore the best comment on the statute under consideration, will be the rescinded statute, which gave birth to it. That statute expresses clearly the purpose of the legislature. It begins with observing, that younger children are but scan-

* Tit. *Executry*, sect. 47.

tily provided by law ; that creditors, in stipulating interest for their money, have no intention to disappoint their younger children ; that the heir profits by their ignorance ; “ and that a “ number of orphans, and fatherless children, “ disappointed of their natural portion, are “ brought to poverty and misery, and forced to “ become beggars ; which is often found by pitiful experience.” Here the words are express, that the statute was made to increase the fund for younger children. And the enacting clause corresponds accurately to the intention of the legislature, statuting and ordaining, “ That “ all contracts or bonds for sums of money, with “ condition of payment of annualrent or profit, “ shall pertain to the bairns and nearest of kin “ of the defunct ; and that the said sums shall “ be confirmed by the executor, without payment of any quot for the same.” The words of the reviving act, though not altogether so explicit, are to the same purpose : “ That all contracts and obligations for sums of money, containing clauses for payment of annualrent or profit, made since the 16th November 1641, “ or to be made in time coming, shall be holden “ to be moveable, to be confirmed by the executor, and to appertain to the nearest of kin and legatars, according to the law and practice of “ moveables.” Let it be remarked, that these words

words are applicable to the next in kin of the creditor only.

So far the matter is clear ; and if a bond bearing interest be rendered moveable *quoad debitorem*, it is surely not by appointment of the statute, but by some inference from it ; and we shall see anon whether there be any ground for drawing such an inference.

What then has led Lord Stair, and all our lawyers after him, to think, that the act under consideration has rendered bonds bearing interest moveable both as to creditor and debtor ? This opinion has nothing to rest on, but a principle of common law unwarily applied to this case, That as far as an heir represents *activè*, as far he must also represent *passivè* ; and that to whatever species of debts he succeeds by a general service, he must be liable to debts of the same kind. Were I reduced to the necessity of pleading nice or doubtful points, I might with a good grace deny, that a principle regarding the representation of an heir, is applicable to an executor, who is a trustee or factor, and in no sense a representative. But the point here is neither nice nor doubtful. It certainly will not be contended, that the foregoing principle must be applied to an executor or next in kin, in spite of the statute. And the first reflection will make it clear, that to subject the next in kin of the debtor in this case, goes not only beyond the words of

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the statute, but is fundamentally subversive of its purpose and intendment. The declared purpose of the statute, is to benefit younger children, by augmenting the fund of their legal provision; which is done by adding to that fund bonds bearing interest, formerly heritable. But it would be a matter of chance, whether younger children would be benefited, were they at the same time made liable to pay such bonds. A man may leave bonds bearing interest, and be due double the sum by bonds of the same kind. The statute in that case, according to the construction given it, would have the effect to lessen the fund appointed by law for younger children. But we need not go to particular cases: in every bond there is a debtor, as well as a creditor; and if bonds bearing interest be rendered simply moveable, it follows necessarily, that as far as the children or next in kin of the creditor are profited, so far precisely are the children or next in kin of the debtor burdened. Instead of providing for younger children, this construction enriches some, and reduces others to poverty, without predilection, or cause of preference. What is this better, than giving with one hand, and taking back with the other? Where then is the remedy for the "hard condition of a great number of orphans and fatherless children, who being disappointed of their natural portion, are brought to great misery," &c.?

&c.? The plain purpose of the statute, which is to enlarge the legal provision of younger children, can only be fulfilled, by enlarging the provision of the creditor's children; leaving the debtor's children to common law as formerly. And therefore, upon the whole, it may with certainty be concluded, that bonds bearing interest are moveable *quoad creditorem*, but heritable *quoad debitorem*.

A R T.

A R T. XXXVII.

Analysis of act of sederunt 28th February 1662, concerning executors-creditors.

THE heir who represents his predecessor, and is held to be *eadem persona* with him, succeeds to every heritable subject. But with respect to moveable subjects, there is no heir: these are managed by an executor appointed by the proprietor himself; and failing his nomination, they are managed by an executor whom the commissary-court appoints. It is the office of the executor to convert the effects into money, and to distribute the money among the persons interested, the creditors, relict, next in kin, legatees, &c.

As personal debts are not ordained to be recorded, it is implied in the very nature of an executor's office, that distribution be delayed till the persons interested have time to put in their claims; for it would be gross injustice, that an honest creditor should be cut out because he cannot run so fast as another. By our law the heir was not subjected to personal debts till the moveables were exhausted; and by act 76. par. 1503, the heir's defence, That the moveables must

must first be discussed, is restricted to a year after the predecessor's death. A year was thought sufficient for the executor, to convert the effects into money, and to distribute the same among the creditors; after which they had access to the heir. Whence it became the executor's duty, to appoint a time within the year for the creditors to receive payment, and to distribute among them the funds collected. This salutary form of management came to be neglected, through the ignorance of executors, or their partiality; and for many years payment made to the first comer has been sustained.

This irregular practice, productive of much injustice, was taken under consideration by the commissioners for administration of justice in Scotland appointed by Oliver Cromwell. In their regulations 1654, article 16. it is enacted, "That hereafter there be no executors-creditors determined and confirmed to any defunct, until half a year be past after the defunct's decease." And in the 18th article it is enacted, "That no decret for payment be extracted against any executor, for six months after the defunct's decease; and that all creditors who shall use diligence against the executor within the said six months, shall come in *pari passu* with others that have decreets ready to extract." The first of these articles seems intended to give time to the commissaries to chuse

a proper person for managing the effects, termed *executor-dative*, preferring always the next in kin, if they apply. The other is intended for a still more salutary purpose; which is, to prevent personal creditors from taking the start of one another, by what is termed *nimious diligence*; instead of having the moveable effects of their deceased debtor divided equally among them. As these regulations fell to the ground on the Restoration, the court of session interposed by the act of federunt under consideration. I see not clearly why the article first mentioned was rejected: perhaps it was thought, that there was no harm in allowing creditors to confirm within the six months, when it gave them no preference. But the other article was completely adopted; the act of federunt in effect declaring, "That no
" diligence done within six months of the pro-
" prietor's death shall give a preference; but
" that all creditors doing diligence within that
" time shall come in *pari passu*." If no diligence done within the six months give a preference, it follows necessarily, that the executor is withheld from making payment within the six months. It was probably thought, that a year was too long a delay; especially as creditors who appear after the six months, and after the moveables are discussed, have access to the heir.

It seems to be an inference from the act of federunt, that a personal creditor who obtains not
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payment from the executor, may, after the six months, betake himself to the heir; and as the statute 1503 was now in disuse, it is probable that creditors were early indulged with this privilege. Personal creditors, grudging even this short delay of six months, have acquired, by a further indulgence of the court, a still greater privilege; which is, to attack the heir without any delay. And yet, as the heir with respect to moveable debts is cautioner only, there is neither law nor equity for making him liable, till the executor be discussed. So cautious was the statute 1503 in this particular, that the heir was not bound to pay even after the year, till the executor found caution to relieve him to the extent of the moveable effects. In our present practice, he is made liable even before the executor himself is liable; for however extensive the moveables may be, an executor is not bound to pay any debt within six months of the debtor's death. Whether this practice can be justified upon any rational principle, is left to be examined by our ablest lawyers.

The act of parliament 1661, to prevent nimious diligence, ranks *pari passu* upon the heritable estate, all creditors who adjudge within year and day of the first effectual adjudication: and the act of federunt under consideration, to prevent nimious diligence upon the personal estate, ranks *pari passu* all creditors who do dili-

gence within six months after the death of the debtor. Other competitions among personal creditors are left to common law ; and to these we proceed. The case of an executor-nominate, of an executor-dative, and of an executor next in kin, shall take the lead. The office of the two first named is purely ministerial : with respect to creditors, the office of the last is the same : they retain indeed the free residue ; but that circumstance has no influence in a competition among creditors. It is the duty of these executors to convert the effects into money, and to distribute the money among the creditors and others interested. If a process be commenced against any of them before the effects are converted into money, no decree can pass against him for payment : the decree can only be declaratory, “ that he shall be bound to pay to the pursuer “ a proportion of the money arising from a sale “ of the effects ;” which means no more but to secure to the creditor his share in the distribution. Though a process be commenced against him, after the effects are converted into money, but before distribution, he is not however bound to pay within the six months. But when these are elapsed, and no interpellation by any other creditor, he is bound to make payment ; and a decree against him for payment will afford a preference to the pursuer against all other creditors appearing afterward ; for it would be unjust, that
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the creditor should suffer by the executor's fault, who ought to have made payment instead of allowing a decree to go against him. If there be an interpellation by other creditors, before the pursuer has obtained his decree for payment, it is the duty of the executor to call all of them in a multiple-pounding; and in that process the creditors will be ranked *pari passu*, if no objection lie against any particular debt.

Next of the case where a creditor is confirmed. His confirmation, which is a species of legal diligence, intitles him, at common law, to retain such a proportion of the subjects confirmed as will satisfy his claim; and to that extent he must be preferred. The surplus, if any be, is divided among the other creditors, according to the rule above laid down: if there be but one creditor to claim the surplus, he must have it; if a plurality, it must be divided among them in a multiple-pounding.

Hitherto the rules of competition are simple. Cases may be figured more complex, where the competition is regulated, partly by common law, and partly by the act of federunt; as where some creditors have cited the executor within the six months, and some after. The former are ranked *pari passu* by the act of federunt. But the act does not prefer them before creditors whose citations are after the six months. The competition in that case is left to common law; and

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at common law all creditors are ranked *pari passu* who have not obtained a decree for payment against the executor. This may occasion an intricate competition. Suppose the following. A creditor confirms within the six months; and processses are raised against him by two other creditors, John within the six months, James after. Let the fund be 12, and each of the debts 8. I begin with computing what each creditor ought to receive at common law, laying aside the act of federunt; and then proceed to examine what alteration is made by the act. At common law, the creditor confirmed would draw his whole sum, leaving 4, the remainder of the fund, to John and James. By this computation, James is intitled to 2, which is all that he can ultimately draw, being neither hurt nor benefited by the act. We shall next examine what John is intitled to draw by virtue of the act. The declaration, that he shall come in *pari passu* with the creditor confirmed, means not, that he shall draw equally with the creditor confirmed, but only that the confirmation shall give no preference. Now, laying aside the confirmation, John can draw but 4, being the third part of the fund; for it is not the intention of the act of federunt, that any creditor should draw more than a just proportion. The result of the whole is, that the executor confirmed draws 6, John 4, James 2. This is a specimen of many intricate

cate competitions that may occur upon the act of federunt. And upon trial, it will be found no less fruitful of such competitions among personal creditors, than the statute 1661 is among real creditors,

ART.

A R T. XXXVIII.

What teinds are given to the patron by
act 23. parl. 1690.

IN Scotland, especially after the Reformation, the patron, beside the power of presenting a minister to serve the cure, enjoyed the privilege of bargaining with the presentee for a moderate stipend; which of course intitled the patron to the surplus of the teinds; and the bargain was commonly executed in the form of a lease granted by the presentee to the patron. The patron's right to the surplus teind, is countenanced by several acts of parliament; particularly by act 1. parl. 1612, declaring it lawful for the patron to make an agreement with the presentee, provided a competent maintenance be reserved to him. And in the act 1649, abolishing the patron's power of presentation, his right to the teinds is there declared to be good and valid. Again, upon the restitution of Episcopacy ann. 1662, when the act 1649 was rescinded, the patron's right to enjoy the surplus teinds is admitted. See particularly act 9. parl. 1661, at the end. Lastly, when by the act under consideration the power of presentation was taken from the patron, and bestowed on the heritors, it is declared, that the

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teinds shall belong to the patron, with the burden of the minister's stipend. And now, by this statute, the patron has a direct right to the teinds, instead of the indirect right he formerly had by a tack of the teinds procured from the presentee.

This short sketch paves the way for examining what teinds were given to the patron by the act under consideration, in lieu of his power of presentation. The question occurred in a memorable case determined in the court of session, the particulars of which follow. James VI. by charter dated 7th March 1593, granted the abbey of Dunfermline, including the teinds, to his consort Queen Anne, and to the heirs procreated betwixt them; whom failing, to his heirs and successors in the crown of Scotland. By virtue of that grant, ratified in parliament ann. 1612, the teinds of the abbey of Dunfermline are now in the crown.

The teinds of the parish of Kirkmichael, part of the said abbey, were claimed by the patron upon the said act 1690, as free teinds in the crown. It was answered, That the teinds of the abbey having been heritably disposed as above mentioned, belong not to the patron; because, by the act 1690, no teinds are bestowed on the patron, but free teinds not heritably disposed. Several other objections being made to the patron's claim, a judgement was given on the whole, rejecting the claim; and there was no judgement given on the present point in particu-

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lar. But it occurred at advising, that the legislature, in making the act 1690, intended no more but to preserve entire to the patron such right to the teinds, as he enjoyed before by means of a tack procured from the presentee, having now no opportunity to procure such a tack. But as the ministers of the parishes belonging to the abbey of Dunfermline are not titulars of the teinds of these parishes, they could not grant a tack of them to the patron. This was illustrated from the case of teinds that belonged to bishops during Episcopacy. These teinds are now in the crown, and may in one view be considered as free teinds. Yet no patron ever pretended right to these; and the patron is no better founded in his claim to the teinds under consideration.

ART.

A R T. XXXIX.

Commentary on act 35. parl. 1693, concerning procuratories of resignation and precepts of seisin.

MAN, a voluntary agent, governs himself and his concerns by his own will; and, in order to fulfil it, he exerts external acts. I deliver an ox that I fold, or a purse of money that I promised: no person ever doubted, but that the property is transferred by delivery pursuant to my will. But it requires a habit of abstraction, to separate a man's will from himself, so as to conceive it operating after his death. Such abstraction is above the power of a savage; and probably was not thought of before writing was introduced in legal acts. A writ expressing a man's will, is visible and tangible: the will adhering to the paper, is preserved in existence even after the man's death. Hence the efficacy of a latter-will or testament in writ, to give right to a legatee, and to direct things to be done after death; the nomination, for example, of tutors and curators, of trustees to sell land for payment of debt, and such like *.

* See Principles of Equity, edit. 2. p. 239.

Seeing, by the law of nature, a man's will is effectual after his death, I am at a loss to discover upon what ground it is laid down in general, *Quod morte mandantis perit mandatum*, unless that it has been established before writing was used in law-proceedings. That a mandate for behoof of the mandant should fall by the death of the mandatary, is rational: I employ an architect to build a house for me; and he dies before a stone is laid: I am not bound to employ the heir, who perhaps is a weaver; and if I be not bound to employ him, he cannot be bound to serve me. Another reason concurs, drawn from the nature of representation: An heir represents not his predecessor with respect to things purely personal, *quæ inherent ossibus*, as expressed by a Roman writer. Supposing the architect to die after performing part of his work, the heir is not bound to complete it, nor am I bound to employ the heir. But neither of these reasons conclude for making a mandate depend on the life of the mandant. His will, we have seen, operates after his death in his testament, and in a settlement of his estate. Why should it not equally operate in a mandate given by him to do something for him after his death?

At the same time, I am far from insisting, that every mandate must subsist after the death of the mandant. The proposition I maintain is only, that there is nothing in the nature of a mandate

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or commission, to make it fall with the mandant; but that its subsistence or not subsistence after his death, depends on what is purposed to be done by it. To explain this proposition, a mandate created for behoof of the mandant himself, must be distinguished from a mandate created for behoof of another person. A mandate in the former case must fall with the mandant; because the end for which it was created, cannot now be fulfilled. Take, for example, a commission to buy a horse for my riding: my death must put an end to this commission, which cannot now be fulfilled. But where the mandate is of such a nature as not to depend on my life, why ought it not to stand as well as a testament or latter-will? The person who undertakes, at my request, to erect a monument for me after my death, is bound both in law and conscience. The like where a person undertakes to lay out my money at interest after my death, or to purchase land with it, or to give some part in charity. By what authority does an executor nominate exercise his office after the testator's death, other than his mandate? Those who maintain the general rule, must admit the cases mentioned to be so many exceptions. But they do not advert, that the reason upon which these exceptions are founded, prove that the rule is not general, but that the purpose of the mandate is the rule.

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With respect to a mandate given for behoof of the mandatary, or of a third person, it may be laid down as a general rule, That the mandate dies not with the mandant. I commission a friend to buy a horse for himself, intending it as a present. The mandate will be effectual, even where it is executed after my death; and my heir will be liable for the price. I give a commission to buy a horse for my son, or for my brother; but die suddenly, without affording time for execution. Does my death put an end to the commission, without evidence or probability of change of mind? Adhering to the general rule above laid down, a special assignment, containing a power to take possession of the moveables specified therein, will intitle the assignee, even after the cedent's death, to lay hold of these moveables at short hand, if not obstructed by the possession of another. Such power in a general assignment cannot indeed be exercised after the cedent's death: not that the power has fallen; but that our law permits not intromission with the goods of a person deceased, but by inventory, which renders confirmation necessary.

There is one sort of mandate that necessarily falls by the death of the mandant, whether given for his own behoof, or for behoof of any other; and that is a mandate to act for him, and in his name. A procuratory of resignation and precept of seisin are of that sort. The constituent's death

death puts an end to such mandates ; because he cannot be represented after his death, nor can any one act in his name. A procurator, after the proprietor's death, cannot in his name surrender the land to the superior ; and for the same reason, the proprietor's death must put an end to a precept of feisin. *Procurator* and *bailie* are relative terms ; and there cannot be a procurator or bailie without a constituent, more than there can be a shadow without a substance.

An obligation for a sum of money, without mentioning assignees, is not assignable. To supply that want, a method was invented to assign it indirectly, by giving a procuratory to the assignee to use the cedent's name in demanding payment. But this was an imperfect method : if the cedent died before intimation, the procuratory died with him ; and the assignee's only resource was a process against the cedent's representatives, to make up a title to the subject assigned, and to grant a new assignment. Intimation during the cedent's life, was indeed held sufficient to transfer the *jus crediti* to the assignee, intitling him to drop his character of procurator, and to act in his own name. But for what reason, I have not yet discovered : the intimation must be in the cedent's name, as the assignee has nothing to say to the debtor, but *qua procurator* ; and his process against the debtor for payment,

payment, ought to be carried on in the same character. Does it not follow, that after the cedent's death, his only resource, notwithstanding the intimation, is the process above mentioned? But principles make little impression on the illiterate; and are little regarded, provided the end can be accomplished in whatever manner.

Thus stood the law down to the year 1693, when the act of parliament under consideration was made, authorising procuratories of resignation, and precepts of seisin, to be executed after the granter's death; and also authorising special assignments to be intimated after the cedent's death. The privilege was not extended to general assignments; which, as observed above, require confirmation. To make this statute accord with principles, has not been attempted by any writer: nor does it seem to be an easy task; for surely the legislature could not mean to empower one to act *procuratorio nomine*, without a constituent. I understand the statute as empowering these several acts to be done, not *procuratorio nomine*, but by express authority of the statute. By that authority, the land is surrendered into the hands of the superior, investment is given on the precept, and intimation is made of the assignment.

There seems to have been no occasion for a
statute

statute with respect to the case last mentioned. The simple addition of the word *assignees* in a money-obligation, removes all difficulties. Were our forefathers so defective in invention, as to overlook an improvement so obvious? If I bind myself to pay a sum to John, I am not bound to pay it to James: but if I bind myself to pay to John, or to his assignee, the bond has a free circulation. The assignee can insist against me in his own name, without needing a procuratory: he can intimate in his own name, whether the cedent be dead or alive; and his discharge to me in his own name extinguishes the debt. All money-obligations are now made payable to the creditor's heirs and assignees; and if assignees happen to be omitted in a bond for borrowed money, the omission, which is understood the effect of oversight, will be supplied in equity, without needing the authority of an act of parliament.

Procuratories and precepts concerning land-rights, may, I think, be so worded, as to be effectual after the death of the granter. It is made out above, that a power granted by me to take possession of a moveable after my death, is effectual at common law: why not also, where the power is to take possession of land? Having sold land to be held of myself, I grant a precept to my bailie, empowering him to deliver possession to the purchaser, whether I be dead or alive. I see

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not, that an instrument of seisin taken on the delivery, should be less effectual than an instrument of seisin taken in common form. The statute declares it equally effectual; and if the powers of a bailie can be enlarged by statute for the benefit of all concerned, why not, by private authority? Upon the same plan of reasoning, a statute is as little necessary for surrendering land into the hands of the superior after the disponent's death. It appears to me, that this reasoning must hold while the land remains *in hereditate jacente* of the disponent. Widely different is the scene, after the heir is served and infeft. By the rules that govern the transmission of property, no procuratory nor precept can avail, but what is given by the present proprietor; and for that reason, the moment an heir is infeft, his predecessor's procuratory or precept falls to the ground. And if it was intended by the legislature, that they should be effectual in this case, it was undoubtedly right to make a statute.

But that this was the intention of the statute, is far from being clear. Like most of the statutes of that period, it is extremely imperfect. The enactment is, "That procuratories and
" precepts shall subsist after the death of the
" granters:" how long, and in what cases, is not said. They must subsist while the subject is *in hereditate jacente* of the disponent; for
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if the statute have not that effect, it has no effect. But was it also intended, that they should subsist after the subject is vested in the heir? If we can draw any light, it must be from the preamble: there is not a word of it in the body of the statute; though an effect so contradictory to common law, ought not to have been left upon conjecture. The preamble complains of “the great and unnecessary expence occasioned by obtaining procuratories and precepts to be renewed.” This complaint refers to the heir infest, the only person who can renew them. An heir infest is bound indeed at common law to renew a procuratory or precept granted by his predecessor: but seldom is this obtained without a process; and the intention of the legislature probably was to save the expence and delay of that process. In short, it seems to be the purpose of the statute, to enable a disponee, at short hand, to execute his procuratory or precept, in every case where the representative is bound to renew it.

It may then safely be concluded, that procuratories and precepts stand good even after the heir is infest. There the privilege stops; for surely it was not intended, that a procuratory or precept should stand good against a purchaser infest, even supposing him to be a gratuitous purchaser. A man disposes his land twice; and after the second purchaser is infest, the disposer

dies. The first purchaser can take no benefit by executing his procuratory or precept; because his taking infeftment will not deprive the second purchaser of the property. And therefore, it must not be presumed, that the privilege was meant to be extended to this case. During the disponent's life, the first purchaser can execute his procuratory or precept, without needing an act of parliament; but in vain would he take infeftment, which would give him no hold of the land in competition with the second purchaser first infeft. And after the disponent's death, why should the first purchaser be authorised by a statute to do what would be idle to do?

The same reasoning is applicable to an heritable bond with procuratory and precept. After granting such a bond, the debtor sells the land, and the purchaser immediately takes infeftment. From what is said above, it is evident, that the statute gives no aid to the creditor. But did not the court of session teach a very different doctrine in a decision July 1758; where it was found, that infeftment taken by the creditor after his debtor's decease, and after the land was vested in the crown by the debtor's forfeiture, did however prefer him before all the personal creditors of the forfeiting person? I answer, No. This decision differs not from the doctrine above laid down; because, with respect to forfeiture for high treason, the crown

is in effect an heir, liable to all the forfeiting person's debts and deeds *in valorem*. And we have seen above, that infestment taken by a purchaser or creditor after the heir is infest, stands good by force of the statute.

ART.

A R T. XL.

Analysis of article 25. regulations 1695,
concerning decreets-arbitral.

JUDGES originally were no less limited in their powers than arbiters are. Their authority was derived from the consent of the litigants: litiscontestation was in reality a contract; and the decree of a judge had precisely the same effect with an award pronounced by an arbiter *. When judges, in the maturity of government, were invested with authority to make their decrees effectual, the consent of litigants ceased to be necessary. But as impressions seldom wear out with the causes that produced them, the original resemblance between the decree of a judge and that of an arbiter, was kept up in superficial reasoning, and in law-language, even so far as to infer, that a decret-arbitral, like the decree of a judge, may be reversed in a court of law. This was an inference wonderfully gross: what can be more obvious, than that to reduce a decret-arbitral for iniquity, is in effect to hold, that a submission is not binding? To correct this error, it is enacted in the 25th article of the regu-

* Historical Law-tracts, tract 9.

lations 1695, " That for the cutting off ground-
" less and expensive pleas and processes in time
" coming, the Lords of Council and Session sus-
" tain no reduction of any decreet-arbitral that
" shall be pronounced hereafter upon a subscri-
" bed submission, at the instance of any of the
" parties submitters, upon any cause or reason
" whatsoever, unless that of corruption, bribery,
" or falsehood, to be alledged against the judges-
" arbitrators who pronounced the same." By
this regulation, a decreet-arbitral obtains its pro-
per effect; for when parties agree to be bound
by the opinion of an arbiter, his opinion, even
where erroneous, must be the rule. But then
it must be his opinion: if an arbiter, from what-
ever motive, pronounce contrary to his opinion,
the parties are not bound; because the agree-
ment is to submit to his opinion, not to what
he shall pronounce contrary to his opinion.

Upon this the question occurs, What rule
have we to judge whether a decreet-arbitral be
the opinion of the arbiter or not? The article
under consideration, answers that question. An
arbiter is presumed to pronounce his decree ac-
cording to conscience, unless corruption, bribery,
or falsehood, be proved against him.

In supporting a decreet-arbitral against an ob-
jection of error in judgement, it is taken for
granted, that the submission is complete in all its
formalities, and that the arbiter acts according
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to the powers given him by the submission. There was no occasion for any regulation as to points that belong to common law. If an arbitrator act *ultra vires*, his decret is void at common law, at least as far as it is *ultra vires*. And if the submission be reduced upon a legal objection, the decret-arbitral must fall with it: If a man, for example, be fraudulently induced to enter into a submission, the submission will be voided in a reduction, and the parties be declared free. And if one be compelled by force or fear to subscribe a submission, he is not bound either by the submission or decret-arbitral. In this manner, a party may be loosed from the fetters of a decret-arbitral, without any violence done to the article under consideration.

I go one step further. By the regulations under consideration, "the Lords of Session shall sustain no reduction of a decret-arbitral upon any cause or reason whatever, except corruption," &c. But they are not prohibited to sustain grounds of nullity that require not a process of reduction, especially if instantly verified. Nor do I rest upon words. I found upon intention chiefly; and urge, that it could not be the intention of the legislature, to support a decret-arbitral that is *ipso jure* null, and no better than a piece of waste paper. I proceed to examples; and the first is, that the decret-arbitral is founded on an error in fact; as where John, debtor

in L. 100 to William deceased, is ordained to pay that sum to James, as the only child of William, when in fact there are several other children of William. The decret-arbitral is void, because it determines a case that is not, and leaves the real case undetermined. But here the error must appear on the face of the writing: considerations or reasonings passing in the mind of a judge, or of an arbiter, are not the subject of proof independent of the writing. An error in fact that is not the foundation of the award, will not be regarded. A piece of ground, computed to be ten acres, being controverted between John and James; the arbiter determines the ten acres to belong to the former. The decret-arbitral will be effectual though the ground is found to be twenty acres; for if it be possible that the arbiter might have given the same award though he had known the real fact, the presumption must lie for the decret-arbitral. See *Instit. De legatis*, § 31. Another nullity is, that the premisses are inconsistent with the conclusion: "Because John owes L. 500 to James, I ordain James to pay that sum to John." Take a third example: It is implied in every submission, that the arbiter shall pronounce an award upon every article submitted, and leave no point open to future controversy. It is accordingly a nullity in a de-

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creet-arbitral that there is a point left open which ought to have been determined. These particulars are sufficient for a specimen: nullities may be figured without end.

ART.

A R T. XLI.

Act of federunt 1709, fixing the time for reclaiming.

DOes this act reach interlocutors in a ranking of creditors on a bankrupt estate? If a question arise that relates to a single creditor only, such as, whether his debt be paid; whether his bond labour not under a certain nullity; whether his adjudication be formal; interlocutors upon such points come under the act of federunt, though pronounced in a ranking.

On the other hand, no interlocutor ranking a particular creditor in a certain place will be final, unless the whole creditors be in the field. A new creditor, producing his interest, is intitled to be ranked in his true place; as no interlocutor passing before he appeared in process, can affect him. And if he be found intitled to a certain place, every other creditor *in pari casu* must be ranked in the same place, without regard to former interlocutors; because in the same ranking the injustice would be glaring to give creditors of the same rank different places. In the case of Belsches of Tofts, decided ann. 1730, it was discovered in the division of the price after the decree of ranking was extracted, that a creditor had been put in a wrong place. The judges had no difficulty to open the decree of ranking, and to put the creditor in his proper place among those of his own rank.

A R T. XLII.

Commentary on act 22. parliament 1685,
concerning entails.

THat no man can name a successor to his heir, is a maxim in the Roman law, founded on the very nature of property ; which accordingly is also a maxim in the law of Scotland. Land, or any subject belonging to me, is at my disposal : but when my heir succeeds, it belongs to him, and is at his disposal. My will cannot regulate the succession to an estate that now belongs to my heir, more than it can regulate the succession to an estate that never belonged to me. The only means in my power for making my will effectual in this case, is the taking my heir bound to make the person named by me his heir ; which, in the Roman law, is termed *fide commissum* *.

This maxim holds in property only, not in rights grafted on property. If a man make a grant burdening his land-property, and in the grant name a series of heirs to succeed to the grantee ; neither the grantee, nor any of his heirs named, can, without consent of the granter, or his heirs, al-

* Historical Law-tracts, tract 3.

ter the order of succession. A proprietor cannot limit his own heirs, who have the power of disposal as amply as he had ; but a proprietor is not bound to suffer any to possess his land, but those he has consented to. Even in Rome, where the maxim was inviolable, it was never doubted, but that in a perpetual lease, termed *emphyteusis*, or in any lease, the proprietor and lessee in conjunction can name the persons who shall succeed in the lease. For the same reason, the nomination of heirs in a feudal grant, is consistent with the strictest principles of property : the superior continues proprietor ; and he is not bound to admit as his vassal or tenant, any but the persons he has consented to. Thus it came to be established by means of the feudal system, not that a man singly can regulate the succession of his heir, but that a vassal, with consent of his superior, can substitute heirs without end, to enjoy his estate one after another.

In the feudal system, the land is the superior's property ; and the vassal has the usufruct only, differing little in substance from a liferent. The vassal may dispose of what belongs to himself ; but as the land is not his property, no deed done by him can affect either the superior, or the heirs of investiture. And thus, by the feudal system, every land-estate was in effect entailed.

But the feudal system was a violent encroachment

ment on the natural rights of men : nature at last prevailed, and overturned the tottering edifice. Even in Scotland, it is reduced to a shadow : the substance is gone, and little left but its formalities. The property, which originally was reserved by the superior, is transferred to the vassal ; and his will governs, not that of the superior. Land is now restored to commerce, and is bought and sold like other merchandise. That this in England was the condition of land-property as early as Edward I. appears from the statute *Quia emptores terrarum*, enacting, “ That a vassal “ may sell his land without consent of the superior, and that the superior shall receive the “ purchaser as his vassal.” Here was an end to entails, as far as founded on the feudal system.

But men, who in peaceable times found leisure to think of perpetuating their name and family, took dislike at the free commerce of land ; and wished for the feudal law as far as it answered their views. When a grant of land is made to a family, conditioned to return to the grantor and his heirs after extinction of that family, it was thought hard, that the grantee, or any of his heirs, should have it in their power to disappoint the donor by aliening the land. To relieve from that hardship, the English statute, *De donis conditionalibus*, was made *. It proceeds on the

* 13. Edward I. cap. 1.

recital, first, of land given to a man and his wife, and their issue, conditionally, that if they die without issue, the land shall revert to the giver, and his heirs. Next, of land given in free marriage, which implies a condition, that if the husband and wife die without issue, the land shall revert to the giver, and his heirs. And, third, of land given to a man, and the heirs of his body, conditionally, that it shall in like manner revert, failing issue. It subsumes, that, contrary to the conditions expressed or implied in such grants, the feoffees had power to alien the land, to the disappointment, not only of the heirs as to their right of succession, but also of the donor as to his right of reversion. Therefore enacts, " That
" the will of the donor shall from henceforth be
" observed ; so that the donees shall have no
" power to alien the land, but that it shall re-
" main to the issue chosen in the deed ; and when
" they fail, shall revert to the donor, or his
" heirs." This statute, in a style very different from the present mode, is laconic, but not the less perspicuous, as it leaves no doubt about the intention of the legislature. It resembles, however, not a little, the will of a despotic prince : it pronounces a *fiat*, but deigns not to prescribe the means for making the *fiat* effectual. It is left to judges and to men learned in the law, to contrive means the best they can. From the whole tenor of the act, it appears, that the land
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is understood to be conveyed to the donee ; and accordingly all writers agree, that the donee is restrained from aliening, not from defect of right, but by force of the statute ; consequently, that his deed of alienation is not void, but only voidable as a transgression of the statute. They further agree, that the debts of the donee are not effectual, more than his alienations, against his heirs, nor against the donor. And lastly, it is held in general, that every act by which the will of the donor can be disappointed, is barred by the statute, not even excepting high treason. These inferences are derived, all of them, from the declared will of the legislature : “ Ordering, “ That the will of the donor be observed ; and “ that the land shall remain to the issue chosen “ in the deed ; and when they fail, shall revert to “ the donor, or his heirs.” The donor accordingly is, by English writers, said to have an estate in the land, which is a fee-simple on expectancy. The donee, commonly called *tenant in tail*, is said to have another estate in the land, termed an *estate-tail* ; which is an estate of inheritance, i. e. an estate that descends to heirs, but which his debts and deeds cannot affect, more than if he were a naked liferenter *.

Did the property remain with the donor, this statute would be conformable to the strictest prin-

* Coke, 2d inst. p. 335.

ciples of the Feudal law ; for, as observed above, no deed done by a vassal can hurt the superior. But the fact which the statute has in view, is a grant of the land to the donee ; which vests the property in him, and reserves nothing to the donor but a reversion. Such a reversion, which is founded on a covenant merely, and has no lien on the land, or, as we express it, is not a real right, does not bar the donee from aliening the land ; and consequently, is not at common law effectual against a purchaser. It binds indeed the donee and his heirs, by virtue of the covenant ; but it binds none who are not parties in the covenant. The statute however declares it effectual against all the world, in spite of principles ; and the statute must be obeyed. The commerce of land is thus rendered extremely hazardous ; for, after the utmost precaution, a purchaser of land must for ever remain uncertain, whether the vender may not have been barred by an entail from aliening. Such obstruction to commerce, we have the charity to believe, was not early foreseen. While an entail is recent, it must be produced by the vender as his title for aliening : but after a family has been long in possession, perhaps a century or two, it will not readily enter into the thoughts of a purchaser to demand a title so far back. English entails became a public nuisance ; and the cir-

cumstance mentioned, contributed probably more than any other to their downfall.

A bolder attack on the principles of justice, even the most sacred, is not to be found in the laws of any country ; — the transactions of creditors and purchasers, upon which their bread may depend, trampled under foot ; and sacrificed, not to the living solely, but to heirs coming into existence perhaps a thousand years after. If a landholder must be humoured in rendering his estate a sort of mortmain, why not put an indelible mark upon it ? Why not publish to the world, Here lies a snake, touch it not ? This metaphorical snake, more poisonous than any that really exist, is not provided even with a rattle to warn passers. Such violent encroachments on justice, confound legal principles, and reduce law to be a chaos. Legal principles ought to be held sacred by the legislature, as well as by individuals, never to be infringed upon any account whatever. But the thirteenth century was a period of gross ignorance through all Europe, the northern parts especially ; and in those dark times, principles, whether of religion, law, or morality, were very little understood. Nor is the statute under consideration singular in that respect. There is a similar instance in Scotland ; and many such may be found in the laws of every country. Where a man sells land, and takes the purchaser bound, upon receiving back the price,

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to restore the land to him, such an obligation, which is merely personal, cannot bar the purchaser from aliening the land for a valuable consideration; though it may subject him to damages for transgressing his obligation. Yet the act 27. of our parliament 1469, declares, "That the reversion provided to the disponer shall be effectual to him against all singular successors, equally as against the granter of the reversion." Neither necessity nor utility are here urged: the act is put entirely upon law and conscience. How cloudy must have been the notions of our lawgivers at that period, not to perceive that both law and conscience are deeply wounded by this act; especially as no provision is made for publishing such a reversion, more than for publishing an English entail?

The curious reader, before he enter upon the act 1685, will not be satisfied with an account of English entails, but will wish to be made acquainted also with entails made in Scotland upon the foundation of common law, prior to the act 1685. By our common law, the property of land vests in the heir upon completing his title by investiture; which impowers him to alien, to contract debt, and to exercise every other act of property. Now, to bar an heir invest from exercising such acts, prohibitive and irritant clauses are the only means known at common

law * ; and yet that they are ineffectual, is demonstrated in Historical Law-tracts †. A man may bind his heirs, by prohibiting them to alien, or contract debt ; but he cannot prohibit one to purchase from his heir, or to lend money to him, because a purchaser or creditor is not subjected to his authority. A penalty annexed to the prohibition, such as a forfeiture of the heir's right, will affect him ; and upon a declarator of irritancy, will deprive him of the estate. And yet, as he continues proprietor till a decree be pronounced in the declarator, his alienations must be effectual, as well as debts contracted by him. Thus, an entailed estate is protected against the deeds of the possessor, as one is against being robbed or murdered : the terror of punishment is in both cases the only protection. If a tenant in tail boldly risk a forfeiture, he can put an end to the firmest entail that can be made at common law.

* From Bacon's history of the nature, use, and proceedings of the law of England, sect. 4. par. 13. we learn, that what are called perpetuities were introduced into England, after the invention of docking an entail by a fine and recovery. These perpetuities were supported by clauses prohibitory and resolute, precisely as our entails are. And it is likely, that the form of our entails was borrowed from the English perpetuities.

† Tract 3.

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We are now prepared for the act 1685, the subject of the present article. The act is no less perplexed than obscure: it expresses an intention to make entails effectual; but that intention is the only thing which is clearly expressed. Such a statute resembles an ancient oracle: the darker, the more revered. Singularly unlucky it is for this nation, that the obscurity of this statute, has led our judges, to extend entails beyond what the words import, and probably beyond what was intended by the legislature.

In commenting upon this statute, the leading point is, Upon whom has the statute bestowed the privilege, of making an entail that shall be secure against creditors and purchasers? The remarkable case of Stormont * paved the way to the statute. The entail upon which the debate arose in that case, was made by a proprietor infest. At that period, and for a long time after the statute, an heir-apparent had no hold of the land, nor any authority over it; and to think of his making an entail would have been a gross absurdity. We may therefore with certainty conclude, that no person was in the eye of the legislature, but one regularly infest as proprietor. And if an heir-apparent be excluded, a dispositive, whose right is personal only, cannot be included.

* 26th February 1662, in the first volume of Decisions collected by Lord Stair.

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There is not a single clause in the statute, that can be stretched to comprehend either : in every clause it is taken for granted, that the persons authorised to make an entail are infeft in the estate ; witness the following clause in particular, “ Such tailzies shall only be allowed, in which “ the foresaid irritant and resolute clauses are “ insert in the procuratories of resignation, charters, precepts, and instruments of feisin.” The deeds and writs here named imply clearly, that the maker of an entail must be infeft ; because such deeds and writs cannot be made by an heir-apparent, or by a disponent.

To have a just notion of a statutory entail, another point is no less necessary to be known ; and that is, the means employed by the statute to secure the estate against creditors and purchasers. The case of Stormont, mentioned above, led the way to the statute. The point debated in that case was, Whether an heir infeft is effectually barred, by prohibitive and irritant clauses, from aliening, and contracting debt ? The affirmative was decided, upon the following ground, That prohibitions and irritancies in an entail, ought to have the same effect to bar persons from bargaining with a tenant in tail, that an interdiction has to bar persons from bargaining with one interdicted. And upon authority of that judgement, many entails were made before the statute had a being. A prevailing bias for entails,

tails, rendered our judges blind to the principles of common law concerning property. Doubts arose ; and the following train of reasoning made an impression. To take advantage of the weak and facile, is contrary to justice and humanity ; and yet it requires an interdiction, which is an act of sovereign authority, to prevent such advantage to be taken. Nor is the sovereign's authority alone sufficient : the interdiction must be published, to put all on their guard. Now it is not in the power of the sovereign, to protect an estate against creditors and purchasers ; and if so, how can it be imagined, that a private proprietor should have such a power ; especially without publishing his deed of entail * ? The legislature, sensible that the argument from interdiction is inconclusive, made the act 1685, in order to bestow upon entails the force of an interdiction. The words are, “ It is statuted and
 “ declared, That it shall be lawful to his Maje-
 “ sty's subjects to tailzie their lands, to substitute
 “ heirs in their tailzies, with such provisions and
 “ conditions as they shall think fit, and to affect
 “ the saids tailzies with irritant and resolute
 “ clauses ; whereby it shall not be lawful to the
 “ heirs of tailzie to sell, contract debt, or do
 “ any other deed, whereby the same may be ad-

* See this point more fully handled in Historical Law-tracts, tract 3.

“ judged

“ judged or evicted from the substitutes, or the
“ succession frustrate or interrupted. And his
“ Majesty declares these clauses to be real and
“ effectual, not only against the contraveners
“ and their heirs, but also against their credi-
“ tors-adjudgers, and other singular successors,
“ whether by legal or conventional titles.” Thus,
by force of the statute, prohibitive and irritant
clauses are made effectual, to bar people from
purchasing from a tenant in tail, or from lending
him money, as they are barred from purchasing
or lending to a person interdicted. But as ju-
stice requires, that an entail be published, as well
as an interdiction, in order to put all men on
their guard, the greatest anxiety is shown to have
it published in such a manner as to leave no per-
son in ignorance. In the first place, it must be
ingrossed in every writ necessary for investment.
In the next place, the original tailzie must judi-
cially be produced before the Lords of Session,
who are ordained to interpose their authority
thereto. In the third place, the tailzie must be
recorded in a register-book kept for that purpose.
And there is a fourth provision, which shows still
more clearly, that publication is what is chiefly
relied on for making an entail effectual. The
provision is, “ That the prohibitory and irritant
“ clauses must be repeated in the rights and con-
“ veyances of the heirs of tailzie by which they
“ bruik or enjoy the estate.” And it is decla-

red, "That if these clauses be omitted in the
 " heir's infeftment, creditors, and other singu-
 " lar successors who contract with him *bona fide*,
 " shall be secure." Our legislature acted wisely
 in requiring these various notifications. They
 had been taught by experience, that the ingross-
 ing the clauses in the original infeftment of en-
 tail, is far from being sufficient. Such an infeft-
 ment may have been executed a century back ;
 and as time advances, becomes more and more
 distant. But even where recent, every person has
 not access to it : a man agreeing to lend a great
 sum on heritable security, may boldly call for the
 title-deeds : but a shopkeeper must not disoblige
 his customers ; and ought therefore to have some
 means more public for discovering whether he be
 in safety to deal with them.

The nature and extent of the security afforded
 to entails by the statute 1685, will be clearly un-
 derstood, upon considering, that it makes no al-
 teration in our common law with respect to the
 transmission of land-property. The estate de-
 scends from the entailer to the heirs named in the
 deed of entail ; and each heir connects with his
 predecessor by a special service and infeftment,
 precisely as where there is no entail. And to e-
 vince, that the property is completely vested in
 each heir, we have the authority of the statute
 itself ; which, taking that proposition for grant-
 ed, employs prohibitive and irritant clauses to

bar alienation. Such clauses would be superfluous and absurd, were a tenant in tail so limited from the nature of his right, as to make it *ultra vires* in him to alien, or contract debt: they would resemble a prohibition to walk on the sea, or to visit the inhabitants of the moon. In the subsequent observations, this proposition will be taken for granted as fundamental. It was not thought adviseable to make any alteration in the nature or transmission of land-property; and the only means left for securing entails, were prohibitions and forfeitures. A tenant in tail is subjected, by his own consent, to the prohibitive and irritant clauses: he accepts of the estate under these conditions. All others are subjected by the statute, discharging them to lend money to a tenant in tail, or to purchase his land. Hence, no deed done contrary to these prohibitions, is available in law: with respect to the tenant in tail, it is voidable as a transgression of his engagement; and with respect both to him and to the person he contracts with, it is voidable as a contempt of legal authority.

Next in order come the essential solemnities of an entail, such as intitle it to the privileges of the statute 1685. I enquire, in the first place, whether it be necessary to a statutory entail that infestment pass on it. That point is determined by a clause mentioned above, "That such tail-
" zies shall only be allowed, in which the irri-
" tant

“ tant and resolute clauses are insert in the pro-
“ curatories of resignation, charters, precepts
“ and instruments of feisin.” Therefore an entail cannot have the privileges of the statute, unless it be engrossed in a procuratory of resignation, in the charter granted by the superior in pursuance of that procuratory, in the precept of feisin, and in the instrument of feisin *. As an entail deviates far from common law, and has no foundation in equity, it must be executed precisely as the statute directs, otherwise it is not a statutory entail. Therefore a deed of entail left by the entailer without completing it by infeftment, is not a statutory entail. Holding strictly to the statute, I cannot admit, that an entail ingrossed in a disposition of land to be held of the granter, is a statutory entail, even though it be completed by infeftment. There is no mention of such an entail in the statute; and supposing it to have

* As by act 7. parl. 1672, it is enjoined, that the precept of feisin be inserted at the end of every charter from the crown; I do not readily see why the irritant and resolute clauses should be twice ingrossed in every such charter. Did our legislature overlook the said act 1672? However this be, one thing is clear, that an entail can have no support from the act 1685, unless the irritant and resolute clauses be ingrossed in the precept of feisin, as well as in the procuratory of resignation, in the charter, and in the instrument of feisin. Upon inspection of the record, it will be found, that this solemnity has not always been completely fulfilled,

been omitted by oversight, which however cannot be made evident, a court, whether of law or of equity, is not impowered to supply the defect. The first essential solemnity then of an entail that is intitled to the privileges of the statute, is, that it be ingrossed in a new settlement of the estate, completed by a procuratory of resignation, a charter from the superior, and seisin upon it. A second essential solemnity is, that the authority of the court of session be given to the entail. And a third, that it be recorded in the register of tailzies. These three particulars are united in the statute, which enacts, " That such tailzies only shall be allowed (i. e. " have the privileges of the statute) where the " foresaid irritant and resolute clauses are inserted in the procuratories of resignation, charters, precepts, and instruments of seisin; and " where the original tailzie is produced before " the court of session, and recorded in a particular register." Without any of these solemnities, an entail may be effectual to regulate the succession of heirs, and to regulate every other point that depends on common law: but unless these solemnities, all of them, be adhibited, an entail can draw no support from the act 1685, more than it can draw from the act 1681, where it wants the name of the writer, or designation of the witnesses. The three solemnities mentioned must be performed in their order.

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The clauses of the entail must, in the first place, be ingrossed in the infeftment. The entail must next be produced before the Lords of Session for their approbation. And the final step is, to record it in the register of tailzies. If a deed of entail, without infeftment, be produced in the court of session, the judges are not bound to interpose their authority: nay they cannot interpose, without contradicting the statute, which expressly enacts, that a tailzie shall not be allowed, unless the irritant and resolute clauses be ingrossed in the infeftment. And if an entail be presented to the register, without authority of the court of session, the clerk-register and his deputes ought not to record it.

Upon the plan of the statute it follows, that no person is intitled to produce an entail before the court of session, in order to have it recorded, but the maker himself, or his heir infeft, who, were there need for it, could make it *de novo*. Any one of the substitutes is indeed intitled to have the entail recorded for preservation; but it is the right of the maker only, or of his heir infeft, to complete the entail, by adhibiting the solemnities required by the statute. This is obvious with respect to the solemnity of inserting in the infeftment the prohibitive and irritant clauses; which depends entirely on the will of the person who makes the entail: he is not bound to make an entail; nor, after taking some steps, is he bound
to

to complete it: he may throw it into the fire if he please. And with respect to every one of the solemnities, a deed of entail, as a *corpus* or moveable, follows the land, and appertains to the heir in feft, who has the same power over it that the maker had. No substitute is intitled to produce it in the court of session, or to record it in the register of entails. Suppose a man leaves his testament imperfect, subscribed by himself, but not by the witnesses. After his death, a legatee applies to the court of session, praying their authority to make the witnesses subscribe, in order to validate the testament. Would the court listen to this prayer? Certainly not. No person is intitled to complete a deed but the maker, or his heir who has right to it by succession. This holds in a testament, and it must equally hold in a deed of entail.

View the matter in a different light. The maker of an entail is not bound to adhibit the statutory solemnities, nor consequently his heir. If so, no action can be sustained at the instance of a substitute, either against the maker, or his heir, to oblige them to complete the entail. Now supposing the deed of entail to fall accidentally into the hands of a substitute, can his accidental possession give him any right over it that he had not formerly? So far from acquiring any new right, he is bound to deliver it to the person to whom

whom it belongs ; and can, if he refuse, be compelled by an action of exhibition.

It may possibly be urged for a substitute, That a man who makes a deed of entail, surely intends to make it effectual ; otherwise why so many anxious clauses *de non alienando, et non contrahendo debitum* ? and that the heir ought to obey the will of his predecessor. It is obvious to answer, first, That nothing is more common than change of mind : a man probably, at the time of making an entail, intends to complete it ; but if he stop short, and leave it in its imperfect state till he dies, may not change of mind be justly inferred ? Answered, next, The heir is not bound to supply any defect in his predecessor's deed, unless he be taken bound by an express clause so to do. And supposing an intention in the predecessor to have his will completed, a court of equity will indeed lay hold of intention, where justice requires their interposition ; but no court will give force to presumed intention, in order to deprive a man of his birthright, by subjecting him to the fetters of an entail.

The following question arises from what is now said. An entail is left by the maker complete in every point, except as to recording : Are the tutors of his infant-heir bound to apply for having it recorded in the register of entails ? It would be an act directly against the interest of their pupil ; and consequently inconsistent with their

their duty. And it would be unjust in the court of session to countenance the application.

Supposing now an entail to be complete in all its solemnities ; the great points to be considered are, What are the effects of it ; Against what heirs it operates ; and, Against what deeds. Of these in their order. The English statute enables a proprietor to withdraw his estate from commerce, and to secure it entire to the heirs of entail. Our statute is very different. What gave rise to it, as mentioned above, is the remarkable case of Stormont, in which the debate was, Whether an heir infest can be barred by prohibitive and irritant clauses from aliening and contracting debt. The court gave their opinion for the affirmative ; but as that opinion had no foundation at common law, the statute was made, enabling proprietors to fetter their heirs infest, beyond what can be done at common law. The prohibitions accordingly and irritancies of the statute, regard none but heirs of entail infest, and those who contract with them. Observe, first, that these clauses are directed against heirs who can sell the estate ; and no heir has that power but who is infest. Observe, next, the clause intitling the substitute who obtains a declarator of irritancy, to serve to a remoter predecessor infest, passing by the contravener. Here evidently the contravening heir is understood to be infest : for surely it requires not a statute to enable the substitute

to pass by an heir not infeft: nay, he must pass by him, as there is no such thing in law as serving to an heir-apparent. Scrutinize the statute from beginning to end, there is not a single word in it to create even a suspicion that any heirs were in view but heirs infeft, and in possession. Debts contracted by a substitute were not in view; nor is there any provision against such debts. Nay more, I say affirmatively, that such debts were intended not to be prohibited; which is evident from the following clause: "That
" creditors, and other singular successors, shall
" be secure who contract *bona fide* with the per-
" son standing infeft in the estate, unless the ir-
" ritant and resolute clauses be in the body of
" his right." Here it is declared lawful to lend money knowingly to an heir of entail, though the entail be on record, if the resolute and irritant clauses be omitted in the heir's infeftment. It could not therefore be the intention of the legislature, to forfeit a man who lends money to a substitute in an entail, even though he know him to be a substitute; and less, if possible, where he lends money *bona fide* without knowing his debtor to be a substitute. An absurdity so gross is not supposeable. A merchant turns bankrupt after borrowing from me a thousand pounds. He succeeds to an entailed estate by the death of many intervening substitutes; and I lay hold of that opportunity to adjudge the estate on a

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charge

charge against him to enter heir. An act of injustice so flagrant as to cut down my adjudication without any wrong on my part, could not be intended. And with respect to the substitute, my debtor, what crime has he committed? A substitute is a free man; nor is even an heir-apparent subjected to the provisions of an entail, till he enter, and be infest: before that step be taken, he is as free and independent as the remotest substitute. At the same time, his declining to enter, will not protect the estate from his creditors, more than if it were a fee-simple: their adjudications on a charge to enter must be effectual. Nor will his entering heir hurt his creditors. The statute prohibits not any person to lend money to a substitute in an entail; and a debt once lawfully contracted, cannot be cut down by the debtor's chusing to enter heir. No entail can be contrived to prevent that consequence. A clause, it is true, may be contrived, excluding from the succession every heir who is in debt. Such a clause may be effectual against the heir; but it will not hurt his creditors, who are not prohibited, either by the statute or at common law, to adjudge the estate for their payment.

Thus, every heir-apparent is left free, by the statute, to annihilate the firmest entail that can be devised. Instead of entering, he contracts debt: his creditors acquire right to the estate
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by adjudication ; and he has got the value in money. Nor can I admit this to be a defect in the statute. It was a great stretch in our legislature, to indulge a few individuals, against the common interest, to bar their heirs infest from aliening, or contracting debt. It would have been a still greater stretch, and also more hurtful to the commerce of land, to bar every one of a long train of substitutes from making such transactions. Our legislature must have been short-sighted indeed, to have overlooked this particular ; and if it was under deliberation, their silence is a demonstration that they had no intention to bar any deeds but those of the heir infest.

The only doubt that can arise upon this point, is, Whether an heir-apparent who suffers the entailed estate to be adjudged for debt contracted by himself, be not accountable to the substitutes for the money he received, considered as the price of the estate. This doubt is easily removed. A substitute has no claim to the estate, nor consequently to the price, while the heir-apparent is alive : nor, after the death of the heir-apparent, can his representatives or executors be made liable ; because the money received by him was borrowed money, and cannot be reckoned the price of an estate that never belonged to him. If it be urged, That the heir-apparent ought to be subjected to damages, for permitting the entailed estate to be carried off by his

creditors ; I answer, That a claim of damages supposes a wrong done which ought to be repaired ; and I see not that a man commits any wrong in borrowing money, though he happens to be a substitute in an entail. A tenant in tail, who, by forbearing to insert in his indentment the prohibitory and irritant clauses, lays the estate open to his creditors, is guilty of a wrong in neglecting what he is enjoined to do by the deed of entail ; and that wrong intitles the substitutes to reparation. But an heir-apparent is not bound by the entail ; and therefore is not guilty of any wrong in contracting debt, and suffering the estate to be attached by his creditors.

So much as to the persons who are subjected by the statute to the provisions of an entail. We next take under consideration what debts and deeds are prohibited. The obscurity of the statute may occasion a doubt, what prohibitions are made effectual against strangers, whether every prohibition that can be devised by an entailor, or only the prohibitions of purchasing, and lending money. A landholder, without needing the aid of a statute, can fetter his heirs at his pleasure : they cannot stand in opposition ; because they inherit the estate on condition of fulfilling his will. But no prohibition, except what is authorised by the statute, can be effectual against those who represent him not. Now, when the statute is examined with the most critical eye, there

there is not found in it any prohibition against strangers, but that of lending money to a tenant in tail, and that of purchasing land from him. If it be urged, That it seems intended by the statute, to make effectual against all the world every provision that can be invented by an entailer; it is answered, first, That such intention cannot be gathered from the statute, not even by the most distant implication: and, next, That supposing the intention to be implied; yet, in a matter repugnant to utility, as well as to the principles of property, equity authorises not judges to supply any defect, whether of words or of intention. Thus it appears, that strangers, in bargaining with a tenant in tail, are subjected to no prohibition but of lending money, and purchasing land. They can straight marches with him; and land may be exchanged for the benefit of both estates: such deeds only are prohibited by the statute as are hurtful to the entailed estate, not what are beneficial *. Churlish entailers put their heirs under a prohibition of granting long leases, though no less prejudicial to the

* By the act 10^o Geo. III. cap. 51. a tenant in tail is permitted to exchange land with a neighbour, to the extent of thirty acres; which indeed supposes, that the exchanging land is barred by the act 1685. But an erroneous supposition, though in an act of parliament, does not overturn law. It cannot be overturned but by a positive enactment.

heirs,

heirs, and even to the estate, than to the public. But there is no authority in the statute for such a prohibition : a lease is not a sale ; nor can it be made the ground of an adjudication for evicting the estate. An entailer may prohibit his heir from granting a long lease ; but that bars not the lessee, over whom he has no power. The lessee is indeed accessory to the wrong done by the lessor, in transgressing a prohibition in the entail ; but such wrongs, which are not criminal *sua natura*, operate not against accessories *. I would not however be understood, to plead for a lease beyond what is necessary for promoting industry and improvements, a lease, for example, of two or three nineteen years. A lease of ninety or a hundred years may justly be held a species of alienation, to fall under the statutory prohibition. A lease of a moderate endurance for an elusory rent, will not fall under that prohibition : but it will be reducible at common law ; because the slightest wrong by a tenant in tail, will affect such accessories as are *in lucro captando*. Neither is a life-rent-locality to a bride in her contract of marriage prohibited by the statute : it is not a loan ; it is not a purchase of any part of the property ; and an adjudication cannot proceed upon it. The same holds with

* See before, article 3. how far a challenge against the author is effectual against the person who acquires from him.

respect to an annuity for life; provided it be granted under a condition, that the annuitant shall not be intitled to adjudge for payment of arrears.

Taking it now for granted, that no act nor deed is prohibited by the statute, but what tends directly or indirectly to carry off land from the heirs of entail; the next inquiry is, Whether all acts and deeds by which land may be carried off from these heirs, are prohibited by the statute. In prosecution of this inquiry, I begin with considering, that as the means employed in the statute for securing entails, are prohibitive and irritant clauses, it clearly follows, that if there be any debts or deeds that cannot fall under a prohibition, these must have their effect at common law; for they are not barred by the statute. Whether there be any debts or deeds of that kind, will appear from the nature of a prohibition. An order requiring any person to perform a certain act, or to forbear performing, supposes that person to be a voluntary agent: to order a man to jump over a mountain, or to restrain his pulse from beating, is an absurdity. Voluntary acts may be prohibited; but there is not a single word in the statute, that points at such an absurdity as the prohibiting involuntary acts. So far from it, that feu-duties, and other casualties of superiority, which are involuntary with respect to every heir of entail, are declared to be effectual.

tual. And there are debts and deeds of various kinds that cannot fall under a prohibition, as being altogether involuntary with respect to the claimant. A merchant who bargains for ready money, and is disappointed of his payment, is not guilty of contemning the authority of the statute : he lent no sum to the tenant in tail, nor intended to give him trust. The hands of a tenant in tail are not tied up from doing mischief : if he burn my house, or rob me of my goods, he is subjected to reparation, without my fault on my part ; and his estate must be liable, as well as his person : it would be gross injustice to protect the estate against such a claim. A tenant in tail grants a lease to me ; but breaks his engagement, and puts another in possession. Without any fault on my part, or any breach of legal authority, I become his creditor for a great sum of damages. A tenant in tail is required by a neighbouring heritor to concur in erecting a march-fence : he fails ; and a decree passes against him for fifty or sixty pounds. A tenant in tail has levied the rents, stock, and teind, near forty years : the titular obtains a decree against him for a large sum as the value of the teind. Debts of the nature mentioned, being altogether involuntary on the creditor's part, must be effectual against the strictest entail. The terce and courtesy, being founded on the law of the land, are not voluntary deeds to be brought under

a prohibition. A stipend to a minister, a salary to a schoolmaster, wages to a servant, an account due to an apothecary, to an agent, and a thousand such, were certainly not intended to be prohibited by the statute; and consequently will be effectual against the estate.

Worldly-minded men, who are fonder of their estates than of their heirs, will be apt to think, that it was the intention of the legislature, though not expressed, to secure an entailed estate against claims of every kind; and that it is incumbent on a court of equity to enforce the intention of the legislature, whether expressed or implied. But, in the first place, these gentlemen have no encouragement from the statute, to say that more was intended but to prohibit purchasing and lending money; especially as it would be grossly unjust to forfeit involuntary debts, where there is no contempt of authority. Such gross injustice, it is true, may be the fruit of the English statute, which declares in general, that the will of the donor shall be observed, and that the land shall remain to the issue chosen in the deed. But that statute, the production of an ignorant age, was not copied by us; nor will ever be copied in any civilized country. In the next place, supposing more to have been intended by the legislature than expressed, yet equity will not permit a judge to give force to any implied intention that is productive of injustice.

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Having

Having said what occurred upon debts, we proceed to purchases. And here another rule occurs, founded on the very nature of a prohibition. To make a prohibition effectual, it is not alone sufficient that the deed prohibited be voluntary: it is necessary that it be also known to the party who transgresses it; for without knowledge, there can be no contempt of authority. This requires explanation. A purchase from one who has no right, is void, whether the purchaser be *in bona* or *mala fide*; because a conveyance from one who has no right, can give no right to the acquirer. But I have had more than one occasion to mention, that a tenant in tail in Scotland, has the property of the estate completely vested in him; and consequently, that if he be barred from aliening, the restraint arises, not from defect of right, but from the statutory prohibition. It follows, as will appear more fully afterward, that a sale by a tenant in tail transfers the property to a purchaser; and that the prohibitive clause can only found a reduction against the purchaser, the result of which is, to deprive him of his right, as a punishment for his contempt of legal authority. But if the purchaser happen to be ignorant that the subject is entailed, he acts *bona fide*, and cannot be reached by a reduction; for it is an inviolable rule of law, That a man cannot be deprived of his property against his consent, unless as a punishment

nishment for wrong done by him. Now, a purchase may be made *bona fide* from a tenant in tail, though the entail has been published according to the injunctions of the statute. In recording an entail, all that the statute requires, is a general designation of the lordships and baronies. The particular farms have names that enter not the record; beside that farms are every day split into parts, and moulded into different farms with new names. I purchase one of these farms from a tenant in tail, having no suspicion that it makes a part of the entailed estate. The property is fairly transferred to me; and I cannot be reached by a reduction, because though I have transgressed the prohibition by purchasing, yet as the transgression is innocent, I have not been guilty of contemning the statute. I put another case still more clear. After possessing this new farm some years without challenge, a purchaser from me is undoubtedly secure; for if a purchase from a tenant in tail who has neglected to insert in his indentment the prohibitive and irritant clauses, be lawful, though known by the purchaser to be part of the entailed estate; a purchase from me, who have no entailed estate, is *a fortiori* lawful. I make a bolder supposition, that a man, purchasing knowingly from a tenant in tail, lies open to a reduction as a contemner of the statute. Having possessed years without challenge, he disposes of the subject for a valuable consideration.

I affirm, that the second purchaser is secure, even supposing him to have known that the subject was entailed. There is no prohibition in the statute but against that person only who purchases from a tenant in tail; and there is no *labes realis* in that purchase to operate against singular successors without end. This case I acknowledge comes under the spirit of the statute, and probably would have been guarded against, had it been foreseen; but in points that affect property and run cross to common law, a *casus omisus* cannot be supplied by any court. The case here supposed, is analogous to a reduction *ex capite inhibitionis*. A man who purchases from a person inhibited, is subjected to that reduction; but the reduction reaches not those who derive right from that man.

We proceed to consider, whether a statutory entail be secure against a fine or a forfeiture inflicted on a tenant in tail. With respect to a fine, the point is not intricate: it must be effectual against the estate; because there can be no fine but by an act of parliament, or by the decree of a court; and therefore is none of the acts or deeds that are prohibited; in which respect, it resembles a claim of damages mentioned above. The statute accordingly declares, "That a fine shall not import a contravention of the irritant clause," i. e. shall not be held to be a deed prohibited by the statute.

Whether

Whether an entailed estate be secure against forfeiture for high treason, is a question that made a figure in the court of session, and also in the House of Lords. It was held to be a subtle question, and puzzled the most learned in our law ; and yet, by a just analysis of our act 1685, it may be reduced to a very simple point. If a tenant in tail be proprietor, which is undoubted, the forfeiture of his lands for high treason is a necessary consequence, as much as a forfeiture of his moveables. The statutory prohibitions are directed against voluntary deeds only, purchasing from a tenant in tail, and lending him money. The King, to whom the forfeiture accrues, has transgressed neither of these prohibitions ; and therefore the statute does not militate against him. And we have the best authority to support this argument : it is declared in the statute itself, “ That nothing in this act shall prejudice his Majesty as to confiscations and fines.” Whence it appears, that the security afforded by act 33. parl. 1690, to substitutes against the forfeiture of a tenant in tail, is a privilege which they are not intitled to from the nature of a Scotch entail. This privilege is indeed considered in the act as a matter of justice merely ; but our legislature was misled by a maxim applicable to an English entail only, That a man ought not to forfeit by his crime, what he cannot alien by his will. A man whose right bestows on him no power of alienation,

lienation, cannot alien either by his will or by his crime. But a man who has the property absolutely vested in him, can alien; and while he remains proprietor, his estate may be affected by adjudication; which will stand effectual, provided it proceed upon claims that are not prohibited by the act 1685.

Upon the union of the two kingdoms, the protection against forfeiture given to substitutes by act 1690, was withdrawn; in order to make the punishment of treason the same in both kingdoms. English entails are in their nature secure against forfeiture; "which," says Lord Bacon, "made the owners less fearful to commit murders, felonies, treason; for that they knew none of these acts could hurt the heir of his inheritance *." To this evil a remedy was provided by 26^o Henry VIII. cap. 13. having the following preamble: "And to the intent that all treason should be the more dreaded, hated, and detested to be done, by any person or persons; and also because it is a great boldness, and an occasion to ill-disposed persons to adventure, and embrace their malicious intents and enterprises, which all true subjects ought to study to eschew." Therefore enacting, "That such offender shall forfeit all such lands, tenements, and hereditaments, which he shall

* Use of the law, ch. On property.

" have

“ have of any estate of inheritance in use or
“ possession, by any right, title, or means.” By
force of this statute, the treason of a tenant in
tail, not only forfeits his own right, but also the
expectancy of his heirs ; because an estate-tail is
an estate of inheritance. But remainder-men,
who are not heirs, but conditional institutes, are
not hurt by the statute : they are understood to
have an estate in the land separate and distinct
from that of the forfeiting person and his heirs.

So stands the law of England ; and in order
that the same acts might be treason in both coun-
tries, and receive the same punishment, the act
7^o Anne, cap. 20. was made, enacting, “ That
“ such crimes and offences as are high treason,
“ or misprision of high treason, in England, and
“ none others, shall, after the first of July 1709,
“ be high treason and misprision of high treason
“ in Scotland ; and that all persons convicted or
“ attainted of high treason, or misprision of high
“ treason, in Scotland, shall be subject and liable
“ to the same corruption of blood, pains, pe-
“ nalties, and forfeitures, with persons convict-
“ ed or attainted of these crimes in England :
“ excepting heirs of entail committing treason
“ before the said time, and married, who shall
“ forfeit for themselves only, and not for the
“ issue of the marriage, being heirs of entail.”
In order to make the treason-laws the same in
both kingdoms, it was no stretch, to forfeit land
entailed

entailed in Scotland. An English entail is, in its nature, secure against forfeiture; and yet is subjected to forfeiture by the act above mentioned of Henry VIII. A Scotch entail affords no security against forfeiture; and to declare this to be law, was no hardship. In repealing our act 1690, the British legislature made no wider step than to deprive heirs of entail of a privilege that had been conferred on them beyond the nature of their right.

But in making the act 7^o of the Queen, it was not adverted to, that forfeiture must have a more extensive effect against a Scotch entail, than by the statute of Henry VIII. it hath against an entail in England. There, forfeiture operates only against the criminal and his heirs, not against remainder-men. But as in Scotch settlements, every person called to the succession is an heir; the treason of a tenant in tail in Scotland, must destroy the entail, root and branch. This inequality was perceived by the House of Lords, and rectified by a judgement given on an appeal from the court of session. The case was this. Sir James Gordon of Park, *anno* 1713, executed a procuratory for resigning his barony of Park into the hands of his superior, for new investment to himself, and after his decease, to William Gordon his eldest son, and the heirs-male of his body; whom failing, to the heirs-male of Sir James's own body of his then present

sent marriage, or of any subsequent marriage ; with divers other substitutions. The usual prohibitory and irritant clauses are ingrossed, and particularly an irritant clause upon committing treason. A charter from the crown and seisin proceeded upon this procuratory, in which these clauses were also ingrossed. Upon the death of Sir James, William his eldest son succeeded. He was forfeited for his accession to the rebellion 1745 ; and the estate was seized for behoof of the crown. As Sir William at that time had no children, the estate was claimed by his brother Captain John Gordon, as the next heir of entail. It was judged here, “ That Sir William Gordon, the person attainted, being by the entail “ disabled from aliening the estate, charging the “ same with debt, or altering the course of succession in prejudice of the claimant and the other heirs of tailzie, or from otherwise hurting or impairing their right to the said estate “ after his death ; therefore the barony of Park “ is, by Sir William’s attainder, forfeited to “ the crown during his life only ; and that after “ his decease, John Gordon, the claimant, hath “ right to the said barony.” But the House of Lords, on an appeal, were clear to reverse this decree, and to find, That the estate, as forfeited, did remain with the crown as long as any issue-male should exist of Sir William’s body. At the same time, it was considered, that according to

the tenor of the settlement, Captain Gordon would, by the law of England, not be an heir of entail to his brother Sir William, but a remainder-man, having a separate estate in the land, conditionally on the extinction of Sir William and his issue-male; therefore “ it was adjudged and declared, That Sir William Gordon, the person attainted, being, under the settlement made by his father Sir James Gordon, seised of an estate-tail in the barony of Park; the said barony, notwithstanding the entail with prohibitive, irritant, and resolute clauses, did, by virtue of the statute 7^o *Anne*, become forfeited to the crown by the said Sir William Gordon’s attainder, during his life and the continuance of such issue-male of his body as would have been inheritable to the estate in case he had not been attainted; and also such estate and interest as was vested in, or might have been claimed by, the said Sir William Gordon, by virtue of the last limitation in the settlement to the heirs and assignees whatsoever of the said Sir James Gordon, after all the substitutions therein contained shall be expired and determined: and that by virtue of the substitution to the heirs-male of the said Sir James Gordon’s body of his then present marriage, the respondent John Gordon hath right to succeed to the said barony of Park, after the death of the said Sir William
“ Gordon,

“ Gordon, and failure of the issue-male of his
“ body, according to the limitations in the said
“ settlement *.”

By this judgement a *remainder* with respect to forfeiture is introduced into our law, hitherto unknown in Scotland. We must not however imagine, that this judgement proceeded from ignorance of the law of Scotland. The innovation was necessary, in order to make a perfect equality between the two nations, with respect to the punishment of treason. A remainder-man in England is not hurt by the treason of the tenant in tail; and in order to communicate that privilege to Scotland, it was necessary to hold Captain Gordon to be a remainder-man. It cannot but be acceptable to the reader to hear the eminent lawyer who presided in the House of Lords at that time, giving his reasons in support of the judgement. These are contained in a letter with which he honoured the author of these Elucidations; and a copy of the letter, as far as relative to the judgement, is added at the end; together with a copy of Lord Chief Baron Parker's argument with respect to this case; and the judgement of the House of Lords upon it.

It has been much controverted, whether in the act 1685 prior entails be comprehended. Had it been the opinion of the legislature, that

* 21st May 1751.

entails are secure at common law, they certainly would not have thought a statute necessary for securing an entailed estate against creditors and purchasers. Now, supposing it to have been the opinion of the legislature, that debts contracted by a tenant in tail before 1685 were effectual against his estate, it would have been grossly unjust to withdraw from the creditors the chief fund of payment, perhaps the only fund. The legislature could never intend to forfeit innocent creditors, who lent their money on the faith that an entail was no bar to their payment: every lawyer would have told them, that they were secure. Hence it may fairly be concluded, that prior entails were left to stand or fall by their own merit; and that there was no intention, in making the act 1685, to wound creditors and purchasers at that time existing. There is accordingly not a single retrospective clause in the statute. It is declared only, "That it shall be lawful to tailzie
" lands and estates," i. e. lawful in time coming. I do not rigidly insist, that an entail, to have the benefit of the statute, must be framed after it. The court of session probably would make no difficulty to interpose their authority to an entail dated before the 1685, provided the prohibitive and irritant clauses be ingrossed in the infestment; and would sustain that entail upon being recorded, as effectual by the statute; saving always debts contracted and purchases made before

fore recording. And this seems to have been the sense of the House of Lords, in an appeal between the Earl of Rothes and his creditors, declaring, that entails prior to the 1685 ought to be recorded according to the statute *.

From general views we descend to the irritancies of the statute. In an entail before the 1685, irritancies were necessary; because a prohibition by a man against his heir, avails not at common law, unless a penalty be annexed. But in a statutory entail, I see no necessity or expedience for irritating the right of a tenant in tail who aliens or contracts debt, when without it the legal prohibition is effectual against all the world. Forfeitures without necessity or expedience, are highly repugnant to the mild laws that ought to govern a free people; and therefore highly absurd. An alienation by a debtor inhibited, produces no forfeiture: it is only declared ineffectual against the inhibitor. An alienation by a tenant in tail, is equally ineffectual against his substitutes. To afford them over and above a declarator of irritancy, is to favour an heir, who is *in lucro captando*, more than an inhibiting creditor, who is *in damno vitando*. Had this consideration occurred to the legislature, no countenance, I am persuaded, would have been given to such an irritancy. But in the entails at that

* 16th January 1761.

time existing, irritancies were common, because they were necessary; and our legislature inadvertently authorised them without necessity. It deserves consideration, whether such irritancies ought to have any support from the court of session: equity declares strongly against them. May it not rationally be urged, That here the words of the statute reach inadvertently beyond intention, and that action ought not to be sustained on words without intention?

There is one clause in the statute that deserves particular animadversion. The words are,
 “ Which provisions and irritant clauses shall be
 “ repeated in all the subsequent conveyances of
 “ the said tailzied estate to any of the heirs of
 “ tailzie; declaring, that the omission shall im-
 “ port a contravention of the irritant and reso-
 “ lutive clauses against the person and his heirs
 “ who shall omit to insert the same; but shall
 “ not militate against creditors and other singu-
 “ lar successors, who have contracted *bona fide*
 “ with the person infected without the said irritant
 “ and resolute clauses in the body of his right.”

A contravention or transgression of a prohibition, is intelligible; but what sense is there in a contravention or transgression of an irritant or resolute clause? I have no excuse for such jargon, but that the sword has always been a greater favourite with my countrymen than the pen. Again, the omission, it is said, shall not militate against

gainst creditors, &c. Did it require a statute to protect creditors against the omission of a tenant in tail? Can an omission have any effect except against the person who is guilty of it, or against his representatives? One who favours entails, will probably attempt to cut a Gordian knot that he cannot untie: neglecting the words, he will give a meaning to the clause, such as he thinks it ought to have, that the omission shall be a forfeiture of the heir's right to the estate. But supposing this to be the meaning, will judges of equity take upon them to enforce a penalty or forfeiture that is not expressed in the statute? And if judges cannot interpose, here is another safe method for defeating an entail: creditors and purchasers are secure, if the irritancies be not ingrossed in the infeftment; and the intended irritancy of the heir's right for his omission, cannot be made effectual by a court of equity; which, in a matter of punishment, will not venture to supply any defect in words. This clause suggests another doubt. It is enacted, or supposed to be enacted, That the heir who neglects to ingross the irritant clauses in his infeftment, shall forfeit for himself and his heirs. What heirs? The words import his heirs of entail; and yet this sense would put an end to the entail altogether, which surely was not intended. But it avails not to examine critically a blundering clause. Nothing else probably was intended,

but to compel every heir to ingross in his infestment the prohibitive and irritant clauses, by making the omission a cause for forfeiting him and the heirs of his body.

The clause under consideration is fruitful of doubts. Is the irritancy mentioned in it effectual by force of the statute, though not contained in the entail? The words seem to favour the affirmative; but are opposed by the following consideration, That it is not the intendment of the statute to make an entail, but only to make entails effectual *secundum formam doni*, or according to the intention of the entailer. A man who, after the date of the statute, makes an entail, knows, that to secure the estate against creditors and purchasers, the prohibitive and irritant clauses must be ingrossed in the successive title-deeds. He ought to provide accordingly by proper clauses; for if these be omitted, the presumption is, that he intended to leave his heirs free. The best interpreters of will are a man's actions: if he do the thing, he must have willed it; if he leave it undone, he probably did not will it. Let it be supposed, that an entailer expressly relieves his heirs from that solemnity: it will not be thought, that the statutory irritancy must notwithstanding take effect; and does he not virtually declare his heirs to be free, when he does not bind them to use the solemnity? The statute therefore is not to be understood literally, as requiring

quiring the heir under an irritancy to engross in his infeftment the irritant and resolute clauses; but only as declaring, that if that solemnity be omitted, the entail shall not be effectual against creditors or purchasers; leaving to entailers at their pleasure to enjoin that solemnity or not. Hence it may be held as undoubted law, that the clause in question was contrived for the safety of creditors and purchasers, not for benefiting the substitutes.

Viewing the irritancies enacted in the statute, a declarator with respect to some is made necessary: others are appointed to take effect *ipso facto* without a declarator. But such difference of expression in a statute eminently defective in composition, ought not to be regarded; for the spirit of the statute requires a declarator in every case. The irritancy against the heir for omitting in his infeftment the prohibitive and irritant clauses, is declared "to have the effect of an *ipso facto* devolution of the estate to the next heir of entail." Let any man who is fond of this statute say, whether such devolution be consistent with what is declared in the same clause, viz. That purchasers and creditors shall be secure. To make the estate devolve *ipso facto* on the next heir, is, in other words, to forfeit the heir in possession the moment he takes infeftment without ingrossing the prohibitive and irritant clauses, and to annul his right to the estate. At

that rate, every sale he makes is void, as flowing *a non habente potestatem*: nor can his creditors affect the entailed estate, which belongs not now to him. How then can purchasers and creditors be secure? It is a glaring inconsistency in the statute to make the devolution take place *ipso facto* without a declarator. Till that declarator be obtained, the heir continues proprietor; and his deeds must operate against the estate, as declared in the statute *.

Taking it now for granted, that a declarator is necessary in every case, the question is, to whom is it competent; whether to every substitute, or to the immediate substitute only. A declarator for annulling debts and deeds of a tenant in tail, is by the statute given to the immediate substitute, without mentioning any other. But in this instance, the words of the statute are short of the intendment. Every substitute is interested to have the estate purged of such debts and deeds as are prohibited by the entail; and an action ought of course to have been afforded to every substitute, for making his interest effectual. But as none but the immediate substitute is mentioned, the defect cannot be supplied even by a court of equity.

Upon the whole, English and Scotch entails

* See this subject more fully handled, Principles of Equity, edit. 2, p. 152,

differ widely from each other. The English statute has broken through every legal obstruction to make an entail impregnable. And as the statute continues in force to this day, English entails must have subsisted as long as the family, had not their ruinous consequences encouraged judges to plot their destruction. Our entails, on the contrary, are so loosely guarded, that they may be attacked with success from several quarters. In the next place, English entails give opportunity for the most flagrant injustice, by want of publication; the omission of which admits no excuse. This defect is amply supplied by our statute: the notifications required are so many and various, as to afford little room for pleading ignorance. Thirdly, English entails are of one form, extremely simple. Our entails are extremely complex, and of very different kinds: in some, the heirs are strictly fettered; in others, less strictly: some contain prohibitions without irritancies; nor has every entail the same irritancies. The statute 1685 has left these differences to entailers: it is not the purpose of the statute, to make an entail where the proprietor made none; nor to add fetters to those contained in the entail. Prohibitions against purchasers and creditors bargaining with an heir infest, are supported by the statute: there it rests, and goes not a single step farther.

In attempting a commentary on a statute so

impolitic in its views, so crude in its conceptions, and so imperfect in its language, it appeared to me indispensable to shake off all bias from authority, and to begin with extracting, if possible, the true spirit and purpose of the statute ; resolving to take next under consideration, the opinions of writers, and the decisions of our supreme court. But upon discovering the former to be little agreeable, in my apprehension, to the spirit of the statute, and the latter to be far from uniform ; I stopt short, utterly at a loss how to proceed. And now, after a long interval, I have come to a resolution not to proceed. It afflicts me to vary from most respectable authorities ; especially as, in opposition to these, I have little expectation that my notions will be relished. May I venture only to hint, that from one who pores days and nights on a subject, and who finds leisure for general views, a more correct system may be expected, than from the decisions of a court consisting of many members, who must attend to a variety of causes almost at the same instant, without having leisure to meditate deeply upon every one ; not to mention, that the nicest points are not always explained to them by the most acute pleaders ?

The

Papers referred to in this article.

1. *Part of a letter from the Earl of Hardwicke to the author.*

——— That you should conceive some dissatisfaction at the judgement of the House of Lords, in the case of Gordon of Park, gives me no surprise. Notwithstanding the part I had in that decision, and my thorough conviction of the justice of it, founded upon the most mature deliberation, I always feared that it would be of difficult digestion with the professors of the law of Scotland. But I cannot sufficiently admire and applaud your great candour in so readily owning a conversion, which does much honour to that judgement, and will, I doubt not, have great weight in removing such doubts as may remain with any of your brethren.

That you may the more clearly see the grounds whereupon the House of Lords proceeded, I take the liberty to inclose a copy of my Lord Chief Baron Parker's argument in delivering the opinion of the judges in the House of Lords upon the question proposed to them, together with a copy of their Lordships order, taken from the journal. I found some difficulty in stating my question, so as to avoid making the English judges judges of the Scotch law, (which would have
been

been highly improper), and simply to refer to them the main point arising upon the construction of the act 7^o *Annæ*. For this reason I was forced to frame the question hypothetically, and to insert two suppositions of points merely of your law reserved for the determination of the House, and which were determined by the opinion of the Lords, given in the debate, after the judges had been heard. All the Lords concurred, that by the law of Scotland, an estate-tailzie, with prohibitive, irritant, and resolute clauses, is an estate of inheritance; and that by the same law no estate or interest in the lands was vested in Sir William Gordon by virtue of the limitation in the settlement of 19th October 1713 to the heirs-male of the body of Sir James Gordon; though that would have been clearly otherwise by the rules of the law of England.

Your discernment has already shown you, that by this method, the question put to the English judges was reduced, purely and simply, to the construction of a statute of the parliament of Great Britain, which it is equally the office of the King's courts in both parts of the united kingdom to expound; and every thing that could make a point in the Scotch law, was kept apart for the decision of the Lords, the proper judges of it.

To repeat the several reasons of the judgement in the cause of Park, would swell my letter too much.

much. But I will just fling out to you two or three ideas, which had weight with me, though they do not fully appear in the opinion of the judges.

1. My foundation was the express declaration of the legislature in the preamble of the act 7^o *Annæ*, which is the basis of the subsequent enacting clause, "That nothing can more conduce
" to the improving the union of the two king-
" doms, than that the laws of both parts of
" Great Britain should agree *as near as may be*,
" especially those laws which relate to high trea-
" son, and the proceedings thereupon, as to
" the nature of the crime, the method of pro-
" ceeding and trial, *and also the forfeitures*
" *and punishment for that offence*, which are
" of the greatest concern both to the crown and
" to the subjects."

2. The enacting clause relative to this subject, is penned in words still more general; and therefore the question must be a question of construction and exposition; wherein, though the proviso immediately following cannot extend or super-add to the enacting clause, it must be allowed to explain and illustrate the meaning of the words.

3. That judges are obliged to make that construction which will best attain the declared intent of the legislators, provided the words of the law will bear it; and therefore that such a con-

struction

struction as would produce the greatest equality between England and Scotland in forfeitures for treason, must be the true construction.

4. In this I felt the force of the difficulty arising from the difference between the nature of your strict Scotch tailzies with substitutions, and our English entails with remainders over, which you have so clearly explained, viz. That in the former every person called to the succession is considered as an heir, and has the fee in him; in the latter, the fee or estate in the land is broken and divided into distinct parts. But then I considered what was to be allowed as the consequence of this diversity between the two laws. Was a tenant in tail, although admitted to have an estate of inheritance descendible to his issue, to forfeit only for his life? Or was every tenant in tail, by reason of being invested in the ideal fee, to forfeit not only for himself and his issue, but also for all the substitutes?

Either of these would plainly destroy the equality in forfeitures professed to be established by the legislature, and not only contradict the intent of the act, but also the express words of the preamble.

The knot lay here: — To avoid forfeiting the whole fee; for as your law places that fee in every tenant in tail, and don't admit of a division of it into particular estates and remainders, there was more colour from legal reasoning to carry it

to

to *that large extent*, than to make a man who had a fee in him, to forfeit for his life only.

But I could not satisfy my own mind, that this *large extent* was either agreeable to the intention of the legislature, or a just and equitable measure between the two nations.

5. How was this to be avoided? By expounding the act by *analogy*; and if you will apply your usual penetration to this point, you will find, that there is often no other possible way of making a consistent sensible construction upon statutes conceived in *general words*, which are to have their operation upon the respective laws of two countries, the rules and forms whereof are different.

These general words will probably always be taken from the language or style of one of these countries more than from the other, and not correspond equally with the genius or terms of both laws. You must then, as in other sciences, reason by *analogy*, or leave at least one half of the statute without effect.

This head of argument from *analogy* is not unknown in the law of England. It was long since established, upon the statute, *De donis conditionalibus*, 13^o Ed. I. which enacts, That a fine levied by tenant in tail shall be *ipso jure nullus*. Stronger words could not be found, in the concise words of those ancient laws, to render such a fine an absolute nullity. But what said

the judges when they came to construe this act? They said, it should be construed by the reason of the common law, (i. e. by *analogy* to that law): That the question was, to create a disability in some persons to alien to the prejudice of others, and the common law took notice of such disabilities; and for that reason a tenant in tail ought to be ranked with ecclesiastical persons seised in right of their churches, or husbands seised in right of their wives, who, by the common law, were disabled to alien to the prejudice of their successors or their wives: That therefore the fine should not be a nullity, and merely void; but should work a discontinuance, take away the entry of the issue, and drive him to his proper action to recover the land.

There are other instances of the like nature in our law. But I am aware, that to these it may be objected, That it was reasoning by *analogy* from one part of the law of England to another part of the law of the same country, which is not the present case. I think that doth not weaken the weight of the example; but I will put a nearer case. In our English courts, wills have frequently come in question, either made by foreigners, or in parts beyond the seas, relating to property proper in England, and expressed in the language and terms of the law of some foreign country. In construing such wills, the constant method has been, first, to enquire and
settle

settle what would be the operation and effect of these terms according to the law of that country from which the terms are taken; and, then, to allow them the like effect here, as near as the law of England will admit. It has seldom happened, that this could be done precisely and specifically. Some such difference has often appeared as exists in the present case, between our remainders and your substitutions; but the court has always allowed these terms their force and effect, as near as might be, in support of right, *ut res magis valeat quam pereat*.

The rules of construction upon acts of parliament, are, in many respects, the same with those upon wills; and by the construction made in the case of *Park*, the words of the preamble of the act 7^o *Anne*, which is the key to the meaning of the legislators, are strictly complied with, viz. "That the laws of both parts of Great Britain should (*as to forfeitures for treason*) agree as near as may be." And the world must allow, that the favourable side for Scotland was chosen.

But though by this decision the like force is given to such substitutions in your tailzies as to English remainders, yet they are by no means turned into remainders to any other purpose, but are to be governed by the rules of the law of Scotland to every other effect; and therefore you express yourself with strict propriety when you

say, that *by this judgement a remainder is introduced into our law with respect to forfeiture only.*

As to the general mischief of your strict entails, and the evil consequences of locking up the land of a country *extra commercium*, I have long been convinced of them, and rejoice to find a person of your knowledge and experience in the law and constitution of Scotland in the same way of thinking. It gives me the better hopes, that it will not be long before some proper remedy is applied; but the discussion of that subject, being political as well as legal, would add too much to the tediousness of a letter which already stands in need of great excuse. I am, &c.

Powis-house, 12th July 1757.

2. *Lord Chief Baron Parker's argument in the case of Gordon of Park.*

Lord Advocate for Scotland Appellant,
John Gordon, Esq; Respondent.

My LORDS,

AT common law, estates in fee-simple, whether absolute or conditional, were forfeited for treason.

By the statute of the 13th Ed. I. (commonly called the statute *De donis*), the forfeiture of
lands

lands entailed, even in case of treason, was taken away; the reason of which will be best collected from the words of the statute.

“ Quod voluntas donatoris, secundum formam
“ in charta doni sui, de cetero observetur; ita
“ quod non habeant illi, quibus tenementum sic
“ fuerit datum sub conditione, potestatem alie-
“ nandi tenementum sic datum, quo minus ad
“ exitum illorum quibus tenementum sic fuerit
“ datum, remaneat post eorum obitum, vel ad
“ donatorem, vel ad ejus heredem, (si exitus de-
“ ficiat), revertatur.”

Therefore, my Lords, the will of the donor, according to the form expressed in the deed of gift, was to be observed; so that they to whom the land was given under such conditions, should have no power to alien it, but that it should remain to their issue after their death, or should revert to the donor for want of issue.

By the express words of the statute they could not alien, by construction they could not forfeit or charge; and the express and constructive restraints stood upon one and the same reason, which was, That either alienation, forfeiture, or charge, was inconsistent with, and would have defeated the provision and intent of the statute.

And the reason given by the counsel for the respondents in the original appeal, That entailed lands were not forfeitable for treason, because
they

they were unalienable, is not well founded; because they were alienable when they were not forfeitable for treason.

For notwithstanding the strong words in the statute *De donis*, in Taltarum's case, in the 12th Ed. IV. an alienation of entailed lands by a common recovery, obtained judicial allowance, and has been so practised ever since; and by the 4th Henry VII. they might be aliened by fine with proclamations; and yet the statute *De donis* protected them from forfeiture for treason, till the making of the statute of the 26th Henry VIII. cap. 13.

By that statute, lands entailed became forfeited for treason, under these words, *all such lands, tenements, and hereditaments, which any such offender shall have of any estate of inheritance*; and the reason was, because this statute, being subsequent to the statute *De donis*, repealed it in this case; and the construction, that these words should operate upon entails, was extremely right, as they otherwise could have no operation at all, because all other estates of inheritance (as I have shown already) were forfeited for treason by the common law.

I will now show your Lordships, that entailed lands, though unalienable beyond all question, were yet forfeited to the crown for treason.

If the King made a gift in tail, saving the reversion to himself, the attainder of treason of
such

such tenant in tail did not bar his issue ; because the statute of the 34th Henry VIII. cap. 20. enacts, That the heir in tail in such case shall have the lands ; any recovery, or any other thing or things hereafter to be had, done, or suffered, by or against such tenant in tail, to the contrary notwithstanding.

Which act coming after the 26th Henry VIII. that gave the forfeiture of lands entailed, was a repeal of that statute, and a restitution of the statute *De donis* in this special case.

But the statute of the 5th and 6th Ed. VI. cap. 11. enacts, That every offender, being lawfully convicted of any manner of high treason, according to the course and custom of the common law, shall lose and forfeit to the King's Highness, his heirs and successors, all such lands, tenements, and hereditaments, which any such offender or offenders shall have of any estate of inheritance in his own right, in use or possession, within this realm of England, or elsewhere within the King's dominions, at the time of such treason committed, or at any time after.

This act coming after 34th Henry VIII. has repealed it *pro tanto*, and made lands of the gift of the crown in tail, subject to forfeiture for treason, as well as other lands entailed.

This has been taken to be law from the time of making the act ; and there is no colour for the observation made at the bar, That it depend-
ed

ed singly on Lord Hales's opinion ; though, if it had done so, the authority would have been very great.

I now proceed to the most material act for your Lordships consideration on this occasion, the act of the 7th of Queen Anne, cap. 21. for improving the union of the two kingdoms.

This act recites the benefit that would accrue to the united kingdom from the provisions of it.

Enacts, That such crimes and offences which are high treason or misprision of high treason within England, shall be the same in Scotland, and no other.

And that offenders shall be indicted and tried in the same manner as in England ; and that all persons convicted or attainted of high treason or misprision of high treason in Scotland, shall be subject and liable to the same corruption of blood, pains, penalties, and *forfeitures*, as persons convicted or attainted of high treason, or misprision of high treason, in England : Provided always, that where any person now is, or shall be before the 1st of July 1709, seised of any lands, &c. in Scotland of an estate-tail, that is to say, an estate-tailzie affected with irritant and resolute or prohibitive clauses, and is, or before the 1st day of July shall be married, if any issue of that marriage be living, or there be possibility of such issue at the time of the high treason committed ; that then, and in such case, the said lands, &c. shall

shall not be forfeited upon the attainder of such person for high treason, but during the life of the person so attainted only ; so that the issue and heirs in tail of such marriage shall inherit the same, the said attainder notwithstanding.

This act, by reference, re-enacted, and extended to Scotland, all the laws of England concerning treason which were then in force, as strongly and effectually as if they had been transcribed into the body of it ; and as, at the time of making the act, all estates of inheritance were and still are forfeited for treason, we think, upon the supposition in your question, that an estate-tailzie, with prohibitive, irritant, and resolute clauses, is an estate of inheritance, and that such an estate of inheritance is forfeited ; for otherwise the forfeitures in England and Scotland would not be the same, though the act expressly requires they should be so.

But it was objected by the learned counsel for the respondent, That by the Scotch act of 1685, estates-tailzie, with prohibitive, irritant, and resolute clauses, were unalienable ; and by the Scotch act of 1690, it is provided, That no forfeiture should prejudice the heirs of entail therein mentioned, provided the right of entail was duly registered ; from whence it was inferred, that Sir William Gordon could only forfeit for his life.

But, my Lords, we are humbly of opinion, that the act 7^o *Anna*, being subsequent to these

Scotch acts, has repealed them *pro tanto*, in the same manner as the 5th and 6th of Ed. VI. repealed 34th Henry VIII. which made lands of the gift of the crown in tail unalienable; and that this estate-tailzie is therefore subjected to forfeiture, that the forfeitures throughout the united kingdom may be the same.

But it was objected by one of the learned gentlemen, That the third clause, which gives the forfeiture, would not have induced a forfeiture of this estate-tailzie, without the aid of the proviso; and that the proviso, which only imports an exception, ought not to extend the construction of the foregoing clause.

But, my Lords, we are humbly of opinion, that the clause which gives the forfeiture, would have induced a forfeiture of this estate-tailzie though the proviso had been omitted out of the act; and we agree, that the proviso ought not to extend the construction of the foregoing clause.

But as the proviso is in the act, and the respondent's case is not the case described in the proviso, *Exceptio firmat regulam in casibus non exceptis*, and greatly strengthens the construction we put upon the act.

As to the reversion in fee, or clause of return, supposing that by the law of Scotland it was in Sir William Gordon at the time of his attainder, we think that to be so clearly forfeited, that it
would

would be wasting your Lordships time to attempt to prove it.

But as to the substitution or limitation to the heirs-male of Sir James Gordon, and the intermediate substitutions or limitations between that and the reversion in fee, upon the supposition in your Lordships question, that no estate or interest was thereby vested in Sir William Gordon, we are humbly of opinion, that no estate or interest derived under any of these intermediate substitutions or limitations is forfeited to the crown by the attainder of Sir William Gordon; because the substitutes claim as persons described, and their estate or interest successively is to be considered as a new acquisition, which can be no more forfeited by the attainder of Sir William Gordon, than a remainder limited after an estate-tail in England can be forfeited by the attainder of the tenant in tail for treason.

Besides, there is a saving in the act of 26th Henry VIII. to all persons, (other than the offenders, their heirs and successors, and such persons as claim to any of their uses) of all such *right*, title, interest, &c. as they might have had if the act had not been made.

And in the vesting act of the 20th of his Majesty's reign, there is a saving to all persons (except the forfeiting persons, their heirs, executors, administrators, and assigns, and persons claiming to their use, or in trust for them) of their estate,

right, title, interest, use, trust, possession, reversion, remainder, and so on.

And we are humbly of opinion, that the saving words in these acts, and particularly the word *right*, are sufficient to preserve the several estates or interests of the substitutes in this settlement from forfeiture.

3. *Judgement of the House of Lords in the case of Gordon of Park.*

Die Martis 21^o Maii 1751.

THE order of the day being read, for taking into further consideration the cause upon the original appeal of his Majesty's Advocate for Scotland, on behalf of his Majesty, complaining of the former part of an interlocutor of the Lords of Session in Scotland of the 16th of November 1750, to which appeal John Gordon Esq, second son of Sir James Gordon of Park deceased, is respondent; as likewise of the cross appeal of the said John Gordon, complaining of the latter part of the said interlocutor, to which appeal his Majesty's said Advocate is respondent; and for the judges to deliver their opinion upon the following question, (viz.), "Supposing, that, by the law of Scotland, an estate-tailzie, with prohibitive, irritant, and resolute clauses, is an estate of inheritance; and supposing also, that,

" by

“ by the law of Scotland, no estate or interest
“ was vested in Sir William Gordon by virtue of
“ the limitations in the settlement of the 19th
“ October 1713, to the heirs-male of the body
“ of Sir James Gordon; what estate or interest
“ in the barony and lands in question was forfeited to the crown, under the limitations of the
“ said settlement, by the attainder of Sir William Gordon?” Whereupon

The Lord Chief Baron of the court of Exchequer accordingly delivered the unanimous opinion of the judges as follows, (viz.), “ That the estate
“ and interest in the barony and lands in question, which was forfeited to the crown, under
“ the limitations of the said settlement, by the
“ attainder of Sir William Gordon, was not only during the life of Sir William Gordon,
“ but so long as there shall be any issue-male of
“ his body which would be inheritable to the
“ estate-tailzie in case he had not been attainted;
“ and that the reversionary interest in the fee
“ thereof, limited by the settlement to the heirs
“ and assigns whatsoever of Sir James Gordon,
“ on failure of the heirs-male of the body of the
“ said Sir James Gordon, and the determination
“ of the several estates by the other substitutions
“ therein contained, was also forfeited; supposing that, by the law of Scotland, such reversionary interest was in Sir William Gordon at
“ the time of his attainder.”

And

And after debate, and due consideration had of what was offered by the counsel on both sides in this cause at the bar on Tuesday, Wednesday, and Thursday last, it is ordered and adjudged by the Lords Spiritual and Temporal in Parliament assembled, That the first part of the said interlocutor, whereby the Lords of Session found, “ That Sir William Gordon, the person attainted, being, by “ the entail, disabled from alienating the estate, “ charging the same with debts, or altering the “ course of succession, in prejudice of the claim- “ ant, and the other heirs of tailzie ; or from o- “ therwise hurting or impairing their right or title “ to the said estate after his death, in any man- “ ner of way whatsoever ; that therefore the e- “ state and barony of Park is, by Sir William’s “ attainder, forfeited to the crown only during “ his life ; and find, That the said John Gordon “ the claimant hath right to the said estate and “ barony of Park after the death of the said Sir “ William Gordon,” be, and the same is hereby reversed. And it is further ordered and adjudged, That the latter part of the said interlocutor, whereby the Lords of Session found, “ That “ the irritancy alledged to be incurred by Sir “ William Gordon, the attainted person, not “ having been declared, nor no advantage taken “ of it before the forfeiture, the forfeiture can- “ not be over-reached or excluded on pretence “ of that irritancy,” be, and the same is hereby affirmed.

affirmed. And it is also hereby declared and adjudged, That Sir William Gordon, the person attainted, being under the settlement made by his father Sir James Gordon, dated the 19th of October 1713, seised of an estate-tailzie in the barony and estate of Park, notwithstanding such tailzie was affected with prohibitive, irritant, and resolutive clauses, the said barony and estate of Park did, by virtue of the statute of the seventh year of the reign of Queen Anne, chap. 21. become forfeited to the crown, by the said Sir William Gordon's attainder, during his life, and the continuance of such issue-male of his body as would have been inheritable to the said estate-tailzie in case he had not been attainted; and also for such estate and interest as was vested in, or might have been claimed by, the said Sir William Gordon, by virtue of the last limitation in the said settlement to the heirs and assignees whatsoever of the said Sir James Gordon, after all the substitutions therein contained shall be expired or determined: And that, by virtue of the substitution to the heirs-male of the said Sir James Gordon's body of his then present marriage, the respondent John Gordon hath right to succeed to the said barony and estate of Park after the death of the said Sir William Gordon, and failure of such issue-male of his body as aforesaid, according to the limitations in the said settlement. And it is further ordered, That liberty be reserved to

the crown, and also to the said John Gordon, and any other person who may become intitled to the said barony and estate of Park by virtue of any of the said substitutions, to apply to the court of session for such further order or direction in the premises, as shall be just, as often as any new right shall accrue to them respectively in consequence of any of the substitutions or limitations in the said settlement.

AP-

A P P E N D I X.

A R T I C L E I.

Regulations of the commissioners for administration of justice in the years 1652 and 1654.

IT is remarkable, that any important object which concerns the whole society, such as, a struggle for liberty, or for religion, never fails to raise a patriotic spirit, which spreads itself upon every interesting subject. During the civil war in the reign of Charles I. many improvements in law were introduced into Scotland, by parliaments held without authority from the sovereign. At the restoration, these parliaments were declared illegal, and their proceedings annulled by the lump. Many acts, however, of these illegal parliaments, were of too great importance to be suppressed: they were adopted after the restoration and made part of our law. From the same spirit of patriotism, many salutary regulations were also introduced by the high court of justice, acting by

the authority of Oliver Cromwell ; some of which were moulded into acts of parliament at different times after the restoration. But the whole deserve to be kept in memory, as making so many links in the history of our law. Some of them have been mentioned formerly *. Others follow.

Regulations concerning the abridging expence or trouble in matters of law, shall take the lead. Originally, a precept of feisin was contained in a writing different from the charter ; which multiplied title-deeds, beside swelling the expence. Therefore, in the regulations 1652 it is enacted, “ That all charters whereupon feisin is to follow, “ shall contain precepts of feisin ingrossed, or on “ the back thereof.” This regulation is copied in the act 7. parl. 1672, so far as to “ discharge “ the passing or writing of any precept of feisin to “ or under the quarter-seal ; and ordaining, that “ in lieu thereof, every charter shall towards the “ end contain a precept of feisin of all the “ lands.” And this act was extended in practice to charters from subjects. In the regulations 1654 enacted, “ That every decret to be pronounced “ by the sberiff or commissary, shall contain in “ the close thereof these words, *Ordains execu- “ tion to pass hereupon in due and competent*

* British Antiquities, essay 4. part. 2. ; Article 35. of the present work.

“ form,

“ form, after the charge hereby warranted to
 “ be given is orderly given and expired. Which
 “ is hereby declared to be as valid and effectual
 “ as precepts formerly were; and that all execu-
 “ tion shall follow accordingly. Wherefore there
 “ shall be no precepts hereafter given out nor ex-
 “ tracted to any party upon their decret, but
 “ allenarly the decret itself.” As this salutary
 regulation was put in practice during the usurpa-
 tion, the general interest has kept it in force to this
 day; for it never received the sanction of an act
 of parliament. In the same view, the following
 article is contained in the regulations 1654:
 “ That licences be granted both before and after
 “ confirmation *excludendo sententiam*, upon
 “ consignation of half of the ordinary price of
 “ confirmation for the sums contained in the li-
 “ cence, which shall be allowed at confirmation;
 “ these licences to be recorded for the use of all
 “ parties having interest.” It was a barbarous
 practice, to debar a party from insisting upon a
 doubtful claim, till he should purchase the privi-
 lege from the commissary. The high court of
 justice was sensible that a remedy was necessary;
 but their regulation, like other reformations in
 law, is imperfect. For why pay the half of the
 ordinary dues for confirming a doubtful claim
 that may produce nothing to the pursuer but
 trouble and expence? But the commissaries,
 whose interest it is to facilitate suits of this kind,

completed the remedy, by granting licences without payment of any part of the dues of confirmation, reserving to draw the full dues in case of success. I add one instance more. As the dues of the privy seal are much higher than those of the signet, there is in the regulations 1652 an order, "That writs heretofore wrote by the writers to the privy seal, shall and may hereafter be written by writers to the signet." This made law, while the high court of justice subsisted: the practice was kept in force after the restoration, by tacit consent of the nation; and the writers to the privy seal had not sufficient authority to stand in opposition. With the same spirit of frugality, summons of error were appointed to be drawn in English, by the writers to the signet; and to pass the signet as an ordinary summons, without passing any other seal.

This court was equally solicitous to abridge the tedious delay of bringing defendants into court. By the regulations 1652, summons of improbation are appointed to be executed on twenty-one days; and summons of exhibition, on six days, omitting the alternative in the old style. Such regulations cannot be effectual against defendants, but by force of law. The court of session renewed both by act of sederunt 29th June 1672.

The commissioners went still further in abridging judicial proceedings. In all processes of old, it was necessary to summon the defendant four different

different times before he was bound to appear. These summons were reduced to three, as appears from parl. 1449, cap. 30.; and afterward to two. This was made still more easy by the regulations 1652, enacting, “ That there be no continuation of the principal summons; but that, “ in place thereof, the principal summons bear “ two diets of comparance; to both which “ diets the defender may be summoned by a sheriff in that part, albeit the summons for the second diet be directed to messengers at arms; “ except where the pursuer intends to refer the “ libel to the oath of party; in which case, “ the second citation to be given by a messenger “ at arms.” This regulation, which fell to the ground upon the restoration, was renewed in the 6th act, parl. 1672; and improved by act 12th, parl. 1693, authorising one citation for both diets of comparance. Here all summons before the court of session are reduced to a single citation; and yet, such is the influence of custom, that the two diets of comparance are kept up in words, though abolished in reality.

In the same regulations it is enacted, “ That “ there be only one term granted for probation “ by witnesses, of libel, exception, or reply: “ And that there be only two diligences granted “ against the witnesses cited to that term; the “ first to bear certification, that if they compare “ not, certification shall be directed against them; “ and

“ and the second to bear caption, with a penalty *ad arbitrium judicis*.” This regulation is also renewed parl. 1672, act 16.

Active and passive transferences did of old occasion both expence and delay. It crept into our practice from the Roman law, that a representative could not even carry on a process commenced by his predecessor, without entering heir to it. This produced an active transference; which is, a sentence by a judge transferring the process from the deceased to his heir. In the libel, and decret of transference, the original process was *verbatim* ingrossed. This Lord Stair complains of as an imposition on the lieges *; and says, that it is now well altered, the process being only expressed by a breviate. But he does not say, that this was owing to the high court of justice ordaining, in their regulations 1652, “ That in summons of transferring there be no necessity to ingross *ad longum* the bonds, contracts, decreets, and others to be transferred, but only to express the date and substance thereof in a summary way.” There could be but one further improvement of an active transference; which is, to intitle the heir to carry on the process without it; which was done, parl. 1693, act 15.

When the defendant in a process died, a de-

* Institutes, book 4. tit. 34.

cree was also thought necessary transferring the process against his representatives. And this was termed a transference *passive*. This form was thought unnecessary by the high court of justice. It is enacted in the regulations 1652, "That there
" be no necessity of summons of transferring of
" process ; but that a wakening be raised, con-
" cluding against the defenders upon the passive
" titles." *N. B.* A wakening is necessary, because an heir has a year to deliberate. This was reducing the matter to its simplest form, so as to need no further improvement. And a transference *passive*, according to the form then used, was confirmed by the said act 15. parl. 1693.

A very irregular practice having crept in, of pointing on decrees and registrate bonds, without giving a debtor time to prepare for payment ;
" by which," says Sir George Mackenzie, " noblemen and persons of quality were oft times
" affronted, and merchants ruined ;" this practice was corrected by the high court of justice, enacting in their regulations 1654, "That no
" pointing be used upon any decret till the party be charged upon fifteen days on ordinary
" decreets, or upon the days contained in the
" clause of registration in writs ; and until the
" said days be expired." This regulation was renewed parl. 1669, act 4.

While writing was rare, several judicial acts were sustained without being tested ; which bred
confusion,

confusion, and frequently made a proof by witnesses necessary. To remedy that evil, it was appointed in the regulations 1652, "That all executions of summons and letters be subscribed by the parties executors, conform to act 141. parl. 1592." And in the regulations 1654, "That he who is to be cautioner in the testament be made to subscribe the act of cautionry, either with his own hand, or by notars before witnesses; otherwise that the same shall make no faith." This regulation is of such a nature as to be kept in force by the interest that parties have in it; without necessity of being renewed by an act of parliament.

The commissioners were no less solicitous to mitigate severe penalties; such especially as the nature of the offence cannot justify. Vicious intromission is a flagrant instance: the man who intermeddles irregularly with moveables that belonged to a person deceased, is subjected to that person's whole debts, without regard to their extent. Our authors do not say how that barbarous practice was introduced; and we must be satisfied with a conjecture. *Gestio pro herede* is a passive title early adopted by us from the Roman law. An heir cannot justly be bound for his predecessor's debts without his consent. But that consent requires not a formal writing: it is sufficient to infer consent, that he behaves as heir, and lays hold of his predecessor's effects. The

case of a stranger who purloins the moveables of a person deceased, without pretending to have any right, differs widely from the *gestio pro herede*, which is an indication of the heir's will to represent his predecessor, and is in no degree penal. And yet a circumstance common to both, viz. That the effects intermeddled with belonged to a deceased person, has unwarily led our forefathers to consider vitious intromission as a sort of *gestio pro herede*. The penalty of vitious intromission cannot possibly have another foundation: and to put the matter past doubt, vitious intromission is handled as one of the passive titles, by Lord Stair, and by every writer after him. This shows in our forefathers great cloudiness in conceptions of law; considering especially a regulation in the Roman law strictly apposite to this case. The person who purloined any moveables in the calamity of a conflagration or of a shipwreck, was made liable in double: what pretext could there be for punishing more severely the delict under consideration? The penalty here, at the same time, may be very great or very small; and a penalty of that kind always gives hope of impunity. If the person died *oboratus*, vitious intromission may be a total forfeiture. If, on the other hand, the person left sufficient to pay his debts, vitious intromission will not even infer the double; for the intermeddler, who is compelled to pay the debts, is entitled to be relieved by the heir or

executor *. If the person deceased had no debts at all, the vitious intromitter runs no risk but simply of restitution. In days of ignorance, I am not surpris'd at crude and indistinct notions of law. But I am surpris'd, that vitious intromission should have subsisted in vigour, perhaps two centuries, without ever having been found fault with before the time of Cromwell's judges. They saw through the thin veil of a passive title; and in their regulations 1654, article 12. they enact, "That the certification of all vitious intromission shall be no farther extended than for what the double value thereof shall be proven to extend to." And what greatly surpris'es me is, that even after this regulation, the veil remained still impenetrable by the judges who succeeded. The regulation, however just and proper, could not be supported but by legal authority. People are more sway'd by interest than by moderation; and creditors are commonly intent to have their claims made effectual, by whatever means. Vitious intromission, accordingly, after the restoration, was held to be a passive title as originally. And it continued in force till it was undermined by our present mild manners; moderation prevailing among our judges, and regularity among our people. At present, it is never heard of in a court of justice, more than if it did not make a branch of our municipal law.

* Craig, lib. 2. dieg. 17. sect. 16.

A R T. II.

Letters of Fire and Sword, and Letters of Intercommuning.

THese are executions in the law of Scotland that few are acquainted with, because they have gone into disuse. Under the mild and equitable government that commenced at the revolution, the manners of this nation have received such a polish, as to render sanguinary laws altogether unnecessary. But such laws ought to be kept in remembrance, that we may not undervalue our present happiness.

Awe and terror are the only effectual means for keeping in subjection a rude undisciplined people. But wild men, like other wild animals, are by degrees made tame and gentle. Awe and terror vanish; and give place to more reputable and more agreeable principles of action; humanity, love of justice, and desire of a good name. Among the turbulent, law extends a thundering voice, and a strong arm: among the mild and gentle, she assumes the authority of a monitor only, not of a tyrant.

1. *Letters of Fire and Sword.*3^d December 1668.

S E D E R U N T

The Lord Chancellor, Hamilton, &c.

CHARLES, be the grace of God, King of Great Britain, France, and Ireland, Defender of the Faith, TO ALL AND SUNDRIE our leidges and subjects whom it effeirs, greiting. FORSAEMEIKLEAS, upon the day of November instant, William Sinclair of Dunbeath, John Sinclair of Murkle, John Gun his fervitor, and Donald Forbes fervitor to Dunbeath, were orderlie denounced rebels, and put to our horn, be vertue of Letters of Denunciation direct against them for not compearing personally before our justices, upon the 24th day of November instant, conform to the criminal letters direct furth against them, at the instance of John Lord Rae, Hugh Munro of Erobell, William Munro his brother, Dame Barbara Mackay, Lady Rae, and Mackay, spouse to the said Hugh Munro of Erobell, for themselves, and in name and behalf of their oppressed tenants and vassalls, and also for themselves, and in name and behalf of the remanent kin and freinds of the deceast

deceast

deceast Hector and William Mackay's, and Sir John Nisbet of Dirleton, Knight, our Advocate, for our interest, against the forenamed persons, and several others therein mentioned, to have underlyen our laws, for the treasonable crimes and others committed be them in manner underwritten, viz. That they, having shaken off all fear of God, conscience of dutie, alledgiance and loyalty to us, and natural tenderness to their country, and peace thereof, did most perfidiously and treasonably contravein the laws and acts of parliament of this our kingdom, by committing the crimes after specified: In so far as the said William Sinclair of Dunbeath, and remanent persons forsaids, with an great many of the inhabitants of the shire of Caithness, to the number of twelve hundereth persons or thereby, having convocate and convened themselves together, upon the day of March last bypast 1668 years, did make leagues, bands, covenants, and mutual promises with others, to invaid the sherifffdom of Sutherland and Strathnaver, and to wrong and oppress our subjects residing therein; and being armed in an hostile and warlike manner and posture, did come to the lands of Stratheridall in Sutherland, belonging to Hugh Munro of Erobell, and there robbing, plundering, houghing, killing, and away-taking the number of one hundereth kowes, worth twenty merks the piece; and illegally, unwarrantably, without any commission, seizing

seizing upon the person of the said Hugh Munro of Erobell, William Munro his brother, and William Munro his uncle, and carrying them from their own houses, being our frie leidges, and incarcerating and imprisoning them in great dungeons and pits, and keeping them there in great misery be the space of many days ; and for treasonable fire-ryseing, and burning several houses, barns, corn-yeards, and others, upon the grounds of the saids lands of Stratheridall, and marching up and down the country of Sutherland and Strathnaver be the space of seven days, quartering upon and oppressing our subjects and leidges within the said bounds ; and utterly destroying the inhabitants their persons and guidis, robbing, reiving, and killing, and away-taking, the number of three hundereth kowes belonging to the forenamed persons ; and als for being actors, airt and pairt, of the cruel murder or slaughter of the deceased William Mackay of Skourie, committed in the month of February 1668 years instant ; and sicklyke for killing and murdering of the deceast Hector Mackay, brother to the said umquhill William Mackay of Skourie, committed be them upon the eleventh day of August last by past, upon the hill of Artloch, within the sheriffdom of by shooting him through the heart and craig, and several other parts of the body, whereof he instantlie died upon the place ; As the saids letters of denunciation, deulie execute,

cute, and regiftrate in the books of Adjournal, produced in prefence of the Lords of our Privy Council, at length reports ; ATT the procefs of the which horn the forenamed perfons do lye and remain, without any fear or regard thereof, and yet daily haunt and repair to kirk, market, and all publick places of this our realm, as if they were innocent perfons and our free leidges, not only to the high and proud contempt of us, our authority, and laws, but to the encouragement of other insolent perfons to commit and do the lyke insolent, odious, and detestable crimes. For bringing the faids rebels to condign punishment, preventing of fuch like crimes, and vindicating our royal authority, wee, with advice of the Lords of our Privie Council, have made and constitute, and, be the tenor hereof, make and constitute, Archibald Earl of Argyll, George Earl of Caithness, Mr David Thores advocate, his deput,

Lord Strathnaver, the Laird of Glenurchie younger, Sir John Munro of Fowlis, the Laird of Balnagown, Sir George Munro, Captain William Mackie of Borlie, and Sir Robert Gordon of Embo, our commissioners in that part, to the effect after specified, giveand, grantand, and committand to them, conjunctly and severally, full power and commission, expreffing, bidding, and charge, to convocate our leidges in arms, and to pafs, fearch, feek, take, and apprehend, and imprifon, and in case of refiftance,

ance, or hostile opposition, to perseu to death the said William Sinclair of Dunbeath, John Sinclair of Murkle, John Gun his servitor, and Donald Forbes servitor to Dunbeath, our rebells forsaids; and if, for their defence, they shall happen to flie to strengths or houses, in that case, we, with advice of the Lords of our Privy Council, give full power and commission to the said commissioners, conjunctly and severally, as said is, to pass, perseu, and assedge the said strengths and houses, raise fire, and use all kinds of force and warlike ensynes that can be had for winning thereof, and apprehending the saids rebells, and their complices being thereintill: and if in persute of the saids rebell and their complices, they resisting to be taken, or assedging the said strengths and houses, there shall happen fire-raising, mutilation, slaughter, destruction of corns or goods, or other inconveniences to follow, wee, with advice foresaid, will and grant, and, for us, and our succeffors, decern and ordain, that the same shall not be impute as crime or offence to our saids commissioners, nor to the persons assisting them in the execution of this our commission; with power to our saids commissioners, and such as shall be convocate be them, to bear, wear, and make use of hagbutts and pistols in the execution of this our commission, notwithstanding any law or proclamation to the contrare. And further, we, with advice foresaid, have taken,
and

and hereby take our saids commissioners and such persons as shall assist them in the execution of this our commission, under our special protection and safeguard. And this our commission to stand and endure for the space of a year after the date hereof. Providing always, that our saids commissioners give an account of their diligence and procedure therein, betwixt and the last day of July next to come. OUR WILL IS HEIRFORE, and we charge you straitly, and commands, that incontinent, thir our letters sein, ye pass to the market-cross of and o-
ther places needful; and thereat, in our name and authority, command and charge all and sundry our good and loving subjects, in the most substantial and warlike manner, to ryse, concur, fortifie, and assist our saids commissioners in the prosecution of this our service, under all highest paine and charge that after may follow. According to justice, as ye will answer. The whilk to do, &c. Given att Edinburgh, the third day of December, and of our reign the twentie year 1668. *Sic subscribitur*, ROTHES, Cancell. HAMILTON. ARGYLE. LINLITHGOW. KINCARDINE. COCHRAN. HALCARTOUN. JO. GILMORE. J. HOME.

*2. Letters of Intercommuning.**3d December 1668.*

CHARLES, be the grace of God, King of Great Britain, France, and Ireland, Defender of the Faith, TO ALL AND SUNDRIE our leidges and subjects whom it effeirs, greiting. FORASMEIKLEAS, upon the day of November instant, William Sinclair of Dunbeath, John Sinclair of Murkle, John Gun his servitor, and Donald Forbes servitor to Dunbeath, were orderlie denounced rebels, and put to our horn, be vertue of Letters of Denunciation direct against them, for not compearing personallie before our justices, upon the 24th day of November last, conform to the criminal letters direct furth against them, at the instance of John Lord Rae, Hugh Munro of Erobell, William Munro his brother, Dame Barbara Mackay, Lady Rae, and Mackay, spouse to the said Hugh Munro of Erobell, for themselves, and in name and behalf of their oppressed tenants and vassals, AND AT THE INSTANCE of Sir John Nisbet of Dirleton, Knight, our Advocate, for our interest, against the forenamed persons, and severall others therein mentioned, to have underlyen the laws, for the treasonable crimes and others committed be them in manner underwritten,

ten,

ten, viz. That they, having shaken off all fear of God, conscience of dutie, alledgiance and loyalty to us, and natural tenderneſs to our country, and peace thereof, did moſt perfidiouſly and treaſonably contraveen the laws and acts of parliament of this our kingdom, by committing the crimes after ſpecified: IN SUA FAR AS the ſaid William Sinclair of Dunbeath, and remanent perſons forſaids, with an great many of the inhabitants of the ſhire of Caithneſs, to the number of twelve hundereth perſons or thereby, having convocate and convened themſelves together, upon the day of March laſt bypaſt 1668 years inſtant, did make leagues, bands, covenants, and mutual promiſes with others, to invaid the ſheriffdomes of Sutherland and Strathnaver, and to wrong and oppreſs our ſubjects reſiding therein; and being armed in an hoſtile and warlike manner and poſture, did come to the lands of Stratheridall in Sutherland, belonging to Hugh Munro of Erobell, and there robbing, plundering, houghing, killing, and away-taking the number of one hundereth kowes, worth twenty merks the piece; and illegally, unwarrantably, and without commiſſion, ſeizing upon the perſons of the ſaids Hugh Munro of Erobell, William Munro his brother, and William Munro his uncle, and carrying them from their own houſes, being our free leidges, and incarcerating and imprifoning them in great dungeons and pits, and keeping them there in

great misery be the space of many days ; and for treasonable fire-ryseing, and burning several houses, barns, corn-yeards, and others, upon the ground of the saids lands of Stratheridall, and marching up and down the country of Sutherland and Strathnaver be the space of seven days, quartering upon and oppressing our subjects and leidges within the saids bounds ; and utterly destroying the inhabitants their persons and guidis, robbing, reiving, and killing, and away-taking, the number of three hundereth kowes belonging to them ; and als for being actors, airt and pairt, of the cruel murder or slaughter of the deceased William Mackay of Skourie, committed in the month of February 1668 years instant ; and sicklyke for killing and murdering of the decest Hector Mackay, brother to the said umquhill William Mackay of Skourie, committed be them upon the eleventh of August last bypast, upon the hill of Artloch, within the sheriffdom of by shooting him through the heart and craig, and several other pairts of the body, whereof he instantlie died upon the place ; as the saids letters of denunciation, deulie execute, and registrate in the books of Adjournal, produced in presence of the Lords of Council, at more length bears ; ATT the process of the which horn the forenamed persons do lye and remain, without any fear or regard thereof, and encouraged and fostered in their rebellion by the

refett and supply which they have and receive from certain of their friends, relations, and acquaintances, in great contempt of our authority and laws. OUR WILL IS HEIRFORE, and we charge you straitly, and commands, that incontinent, thir our letters seen, ye pass to the market- cros of and other places needful ; and thereat, in our name and authority, command and charge all and fundry our leidges, that they, nor none of them, presume, nor take upon hand, to refett, supply, nor intercommune with the said William Sinclair of Dunbeath, John Sinclair of Murkle, John Gun his servitor, and Donald Forbes servitor to Dunbeath, our rebels, nor furnish them meat, drink, house, harbour, powder, bullets, armour, victuals, boats, vessels, nor no other thing comfortable to them ; nor receive their guidis in keeping, nor transport them to nor frae ferries, nor have intelligence with them be word, write, or message, under the pain to be repute airt and pairt with them in their rebellious and wicked deids, and punished with all rigor, to the terror of others. Given, &c.
Per actum Dominorum, &c.

T H E E N D.



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